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### **Flimsy Precedent and Narrow Vision: A Call for Congressional Amendment of Title VII and the ADA in Response to Boureslan**

Monique C. Lillard

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# FLIMSY PRECEDENT AND NARROW VISION: A CALL FOR CONGRESSIONAL AMENDMENT OF TITLE VII AND THE ADA IN RESPONSE TO *Boureslan*†

Monique C. Lillard\*

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## I. INTRODUCTION

In March 1991, the United States Supreme Court determined that Title VII of the Civil Rights Act of 1964 ("Title VII")<sup>1</sup> no longer protects United States citizens from discrimination by United States companies, if the discrimination takes place outside of the United States.<sup>2</sup> This decision leaves many Americans without pro-

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† After this article went to the publisher, Congress enacted significant amendments to section 701(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f), and section 101(4) of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(4). Civil Rights Act of 1991, section 109.

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1. 42 U.S.C. §§ 2000a to 2000h-6 (1988).

2. EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991).

tection against employment discrimination on the grounds of race, gender, color, religion or national origin, and must be remedied by Congress. Dictum in the opinion calls into question the extraterritorial application of the new Americans With Disabilities Act of 1990 ("ADA").<sup>3</sup> This new act should also be amended to avoid uncertainty.

In its March decision *Equal Employment Opportunity Commission v. Arabian American Oil Co. ("Boureslan")*,<sup>4</sup> the Court narrowly interpreted Title VII despite authority requiring broad interpretation of the statute, and strengthened a previously weak and reductionist rule of construction.<sup>5</sup> *Boureslan* is one in a series of decisions limiting the scope of Title VII. To combat this narrowing trend, Congress should further modify Title VII to establish that the statute should be construed to benefit groups who have traditionally been discriminated against in a given job category without unnecessarily trammelling the rights of innocent third parties.

## II. THE *Boureslan* DECISION

Ali Boureslan is a naturalized American citizen.<sup>6</sup> He was employed as an engineer in July 1979, by Aramco Services Company ("ASC"), a subsidiary of Arabian American Oil Company ("Aramco").<sup>7</sup> Aramco is a United States corporation whose principal place of business is in Saudi Arabia.<sup>8</sup>

Mr. Boureslan started working for ASC in Texas and in November 1980, was transferred to Aramco in Saudi Arabia.<sup>9</sup> "[His] troubles began"<sup>10</sup> in September 1982, when his supervisor allegedly began harassing him about his national origin, race and religion.<sup>11</sup> Relations deteriorated, resulting in his termination in June 1984.<sup>12</sup>

Mr. Boureslan sued under both Title VII and state law.<sup>13</sup> Aramco's<sup>14</sup> response was to move to dismiss for lack of subject matter jurisdiction, arguing that Title VII does not apply to Mr. Boureslan's employment in Saudi Arabia, and that the state law claims should be dismissed for lack of pendent jurisdiction.<sup>15</sup> The district

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3. *Id.* at 1236 (citing Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990)(codified as amended at 42 U.S.C. §§ 12101-12213)(Supp. 1991))).

4. 111 S. Ct. 1227 (1991), *Boureslan v. Aramco*, 892 F.2d 1271 (5th Cir. 1990)(en banc), *aff'g*, 857 F.2d 1014 (5th Cir. 1988), *aff'g*, 653 F. Supp. 629 (S.D. Tex. 1987). *Boureslan* was consolidated with *EEOC v. Arabian Am. Oil Co. and Aramco Services Co.*, Nos. 89-1838 and 89-1845. See *infra* note 24.

5. *Boureslan*, 111 S. Ct. 1227.

6. *Id.* at 1229.

7. *Id.* at 1230.

8. *Id.*

9. *Id.*

10. *Boureslan v. Aramco*, 653 F. Supp. 629 (S.D. Tex. 1987).

11. *Id.*

12. *Id.*

13. *Id.*

14. For convenience, both defendants will be referred to as "Aramco" or "defendants."

15. *Boureslan*, 653 F. Supp. at 629.

court granted Aramco's motion,<sup>16</sup> and its decision was affirmed by a three-judge panel of the Fifth Circuit.<sup>17</sup> The decision was also affirmed by the Fifth Circuit en banc.<sup>18</sup> Five circuit judges disagreed with these decisions.<sup>19</sup>

Mr. Boureslan gave the Supreme Court its first opportunity to rule on the issue of extraterritorial application of Title VII,<sup>20</sup> and six members of the Court declared that the language of the statute is insufficient to allow for its application to acts committed abroad.<sup>21</sup>

Chief Justice Rehnquist, writing for the majority, began his analysis by stating the rule of *Foley Brothers, Inc. v. Filardo* ("Foley"),<sup>22</sup> which provides that unless a contrary intent appears, a statute is intended to have only domestic application.<sup>23</sup> The question then becomes whether such a contrary intent appears in Title VII. Mr. Boureslan and the Equal Employment Opportunity Commission ("EEOC," collectively "petitioners")<sup>24</sup> argued that such contrary intent could be found in the broad definitions of the jurisdictional terms "employer" and "commerce" as well as in the implications of the "alien exemption" provision,<sup>25</sup> and that the Court should defer to the EEOC's interpretation that the statute applied extraterritorially.<sup>26</sup> The majority concluded "that petitioners' evidence, while not totally lack-

16. *Id.*

17. *Boureslan*, 857 F.2d 1014 (5th Cir. 1988).

18. *Boureslan*, 892 F.2d 1271 (5th Cir. 1990).

19. *Boureslan*, 892 F.2d at 1274-82 (King, J., dissenting); *Boureslan*, 857 F.2d at 1021-34 (King, J., dissenting).

20. *EEOC v. Arabian Am. Oil Co.*, 110 S. Ct. 1227 (1991).

Justice Antonin Scalia addressed the issue before joining the United States Supreme Court. In his capacity as Assistant Attorney General he testified before Congress:

With respect to discrimination in employment by private companies and individuals, Title VII of the 1964 Civil Rights Act, as amended, prohibits a broad range of "unlawful employment practices" by any private employer "engaged in any industry affecting commerce who has fifteen or more employees . . . ." Once again the [statute] contains an exemption "with respect to the employment of aliens outside any state," which implies that it is applicable to the employment of United States citizens by covered employers anywhere in the world.

*Foreign Investment and Arab Boycott Legislation, Hearings on S. 245 Before the Subcommittee on International Finance of the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 165 (1975)(statement of Antonin Scalia, Assistant Att'y Gen., Off. Legal Couns., Just. Dep't.).

In March, 1991, Justice Scalia concurred with the majority, stating:

Given the presumption against extraterritoriality that the Court accurately describes, and the requirement that the intent to overcome it be "clearly expressed," it is in my view not reasonable to give effect to mere implications from the statutory language as the EEOC has done.

*Boureslan*, 111 S. Ct. at 1236 (Scalia, J., concurring). The Justice made no mention of his statement 17 years before, although Justice Marshall supported his dissent by quoting his brother justice's statement. *Id.* at 1245 (Marshall, J., dissenting).

21. *Boureslan*, 111 S. Ct. 1227 (1991).

22. 336 U.S. 281 (1949).

23. *Boureslan*, 111 S. Ct. at 1230.

24. The EEOC took the "highly unusual step of seeking intervention at the appellate stage after . . . [the Fifth Circuit panel decision] . . . . If for some reason Mr. Boureslan did not further pursue the matter on appeal, the Commission would have been left with an unfavorable appellate precedent . . . ." Cherian, *Current Developments in Transnational Employment Rights*, 40 LAB. L.J. 259, 262-63 (1989).

25. *Boureslan*, 111 S. Ct. at 1230-31. Section 2000e-1 of 42 U.S.C. provides in pertinent part: "This subchapter shall not apply to an employer with respect to the employment of aliens outside any State . . . ." 42 U.S.C. § 2000e-1 (1970).

26. *Boureslan*, 111 S. Ct. at 1235.

ing in probative value, falls short of demonstrating the affirmative congressional intent required to extend the protections of the Title VII beyond our territorial borders."<sup>27</sup>

The majority's decision in *Boureslan* is striking because the reasons given for rejecting the arguments made by petitioners all eventually come back to what it called variously a "canon of construction," a "long-standing principle" and a "presumption."<sup>28</sup> This principle is "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."<sup>29</sup> The majority used this principle as a presumption to tip its analysis of each of petitioners' arguments; petitioners had the uphill road. At one point Chief Justice Rehnquist stated: "If we were to permit possible, or even plausible interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption."<sup>30</sup> Examination of prior case law indicates that little was left of the presumption until the Court's recent resurrection of it in *Boureslan*.<sup>31</sup>

*Foley* provides the majority's primary authority for the presumption. In that case an American citizen worked for an American contractor on a construction project in Iraq and Iran.<sup>32</sup> He sued for overtime pay for work done in excess of eight hours per day.<sup>33</sup> The issue was whether the Eight Hour Law<sup>34</sup> applied to his situation.<sup>35</sup>

The plaintiff had several strong arguments. His employer had contracted to build public works on behalf of the United States.<sup>36</sup> The contract the employer had expressly agreed to required the employer to "obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America."<sup>37</sup> Further, the Eight Hour Law provided for time and a half overtime pay for work done in excess of eight hours per day by "every laborer and mechanic employed by any contractor or sub-contractor" performing a public work contract for the United States.<sup>38</sup> Section 324 of the Eight Hour Law also provided:

*Every contract made to which the United States . . . is a party . . . shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor . . . shall be re-*

27. *Id.* at 1231.

28. *Id.*

29. *Id.* (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949)).

30. *Id.* at 1233.

31. Two years earlier in *Argentine Republic v. Amerasia Shipping*, 488 U.S. 428 (1989), Chief Justice Rehnquist applied *Foley*, but the presumption was not determinative in that case. The Court determined that the sole basis for obtaining jurisdiction over a foreign state was the Foreign Sovereign Immunities Act. *Id.* at 431 (citing 28 U.S.C. § 1330 (1986)).

32. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 283 (1949).

33. *Id.* at 283.

34. 40 U.S.C. § 324 (1948)(repealed 1962).

35. *Foley*, 336 U.S. at 282.

36. *Id.* at 283.

37. *Id.*

38. *Id.* at 282-83 (citing 40 U.S.C. §§ 321, 325(a)(1940) (repealed 1962))(emphasis added).

quired or permitted to work more than eight hours in any one calendar day upon such work.<sup>39</sup>

Finally, an Executive Order<sup>40</sup> had been issued which "suspended the law as to laborers and mechanics employed directly by the government at Atlantic bases leased from Great Britain."<sup>41</sup> This implied that the President had concluded that the statute applied to these bases, otherwise no suspension for government employees would have been necessary.<sup>42</sup>

Nonetheless, the *Foley* majority held:

The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, . . . is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions. We find nothing in the Act itself, as amended, nor in the legislative history, which would lead to the belief that Congress entertained any intention other than the normal one in this case.

. . . .

There is no language in the Eight Hour Law, here in question, that gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.<sup>43</sup>

The *Foley* Court looked to the scheme of the Eight Hour Law, and noted that no distinction is drawn between alien and citizen laborers.<sup>44</sup> "Unless we were to read such a distinction into the statute we should be forced to conclude . . . that Congress intended to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land."<sup>45</sup> The justices also cited legislative history for the proposition that labor matters like wages and hours are particularly domestic concerns.<sup>46</sup> To further bolster its position, the *Foley* Court deferred to the most recent administrative interpretations of the Eight Hour Law by the Attorney General and the Comptroller General, who opposed extraterritorial application and disagreed with an earlier Attorney General opinion in favor of extraterritoriality.<sup>47</sup>

The highest hurdle for the *Foley* Court was the "every contract," "every laborer" language of the statute,<sup>48</sup> which the justices jumped over by stating:

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39. *Id.* at 282 (quoting 40 U.S.C. § 324 (1948)(repealed 1962))(emphasis added).

40. Exec. Order No. 8626, 3 C.F.R. 850 (Supp. 1940).

41. *Foley*, 336 U.S. at 288.

42. *Id.*

43. *Id.*

44. *Id.* at 286.

45. *Id.* Obviously this reasoning does not apply to Title VII, because the alien exemption provision addresses this very issue. See *supra* note 25.

46. *Foley*, 336 U.S. at 285-86. But see *infra* notes 140-44 and accompanying text.

47. *Id.* at 289.

48. See *supra* notes 38-39 and accompanying text.

Although the statute expressly requires the inclusion in every government public-works contract of the eight-hour provision, the Secretary of the Treasury has approved a standard form for construction contracts which contains eight-hour provisions but which provides that the use of the form will not be required in foreign countries . . . . The inclusion of such provisions is also required by War Department Procurement Regulation No. 3, § 346, in "all contracts subject to the provisions of the Eight Hour Law." Yet neither the instant contract nor others covering off-continent operations contain the Eight Hour Law clause. Similarly the Department of State "does not consider it legally necessary to include provisions of the Eight Hour Law in contracts to be performed in foreign countries."<sup>49</sup>

Thus, the Secretaries of Treasury, War, and State could overrule Congress by approving a form.

The Court dealt with the "every contract" language of section 324 by writing: "Nothing in the legislative history supports the conclusion . . . that 'every contract' must of necessity, by virtue of the broadness of the language, include contracts for work to be performed in foreign countries."<sup>50</sup> The Court discussed an amendment making the Act apply to dredgers in any river or harbor of the United States or the District of Columbia.<sup>51</sup> The amendment was a response to a court decision holding that dredgers were not covered employees under the act.<sup>52</sup>

In its attempt to secure equality of treatment for dredgers on the one hand and laborers and mechanics on the other, Congress would hardly have intended for coverage over the latter class to extend to the far corners of the globe while coverage over the former was limited to work performed in rivers or harbors "of the United States or of the District of Columbia."<sup>53</sup>

Thus, *Foley* denied extraterritorial application of the law despite several statutory provisions which left room for a finding of congressional intent to cover at least the situation presented by the facts of the case. The Court took the position that Congress did not really mean what it said when it used the words "every con-

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49. *Foley*, 336 U.S. at 290 (citation omitted).

50. *Id.* at 287.

51. *Id.*

52. *Id.*

53. *Id.* at 287-88.

tract," quoting *American Banana Co. v. United Fruit Co.*:<sup>54</sup> "Words having universal scope, such as '[e]very contract in restraint of trade,' '[e]very person who shall monopolize,' etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch."<sup>55</sup>

Justice Frankfurter went even farther in his concurrence. He candidly asserted that the economic considerations cited by the Attorney General's and Comptroller General's opinions against extraterritoriality "ought properly to take precedence over the literal language of the Eight Hour Law."<sup>56</sup> But his concurrence revealed how easily the presumption can be enfeebled. He explained that in the same term the Court had decided *Vermilya Brown Co. v. Connell*,<sup>57</sup> which extended the Fair Labor Standards Act ("FLSA") to foreign conditions, even though that "was an extension more difficult than that which the Court avoids here both because not apparently compelled by the literal terms of the Fair Labor Standards Act and because that Act is not confined in its application to contracts to which the United States is a party."<sup>58</sup>

Several reasons have emerged explaining the existence of the canon espoused in *Foley*. According to the Court: "It is based on the assumption that Congress is primarily concerned with domestic conditions."<sup>59</sup> Judge Posner, however, cited a different rationale:

54. In *American Banana*, the plaintiff charged that the defendant had combined with the government of Costa Rica to interfere with his business, in violation of the Act to Protect Trade against Monopolies. *American Banana*, 213 U.S. at 355. All of the alleged acts in issue took place in Panama or Costa Rica where they were not illegal. Justice Holmes wrote for the majority stating: "[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *Id.* at 356. In Holmes' view, to hold otherwise would be generally unjust, impliedly because the defendant would not have proper notice of the illegality of his acts. This argument is not valid in the Title VII context because until the trial court's decision in *Boureslan*, the courts and the EEOC were in agreement about Title VII's extraterritorial reach. *American Banana* was further complicated because of alleged wrongdoing on the part of the nation of Costa Rica. The Court was unwilling to engage in "interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." *Id.* at 356. *American Banana* remains the strongest statement against extraterritorial application of United States statutes. One commentator has called *American Banana* "the highwater mark of a territorial limitation on the reach of United States laws. While the case never formally has been overruled, it is doubtful that it would be decided the same way today." Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1009 n.23 (1976).

55. *Foley*, 336 U.S. at 287 n.3 (quoting *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909)).

56. *Id.* at 292 (Frankfurter, J., concurring).

57. 335 U.S. 377 (1948). The FLSA was later amended.

58. *Foley*, 336 U.S. at 292. The majority's response was that the FLSA specifically covered "possessions" of the United States, which amounted to a specific direction that the FLSA should apply off United States soil. *Id.* at 285. Frankfurter used his concurrence in *Foley* as a vehicle to reargue his dissent in *Vermilya-Brown*, and finally to come to the biting conclusion that if he were to follow *Vermilya-Brown* precedent in *Foley* he could not join in reading the narrow phrase "every contract made to which the United States . . . is a party" in a way which departed from its literal terms when the only reason for such a departure is reluctance to attribute to Congress an intention to interfere in "labor conditions which are the primary concern of a foreign country."

*Id.* at 296.

59. *Id.* at 285.



The fear of outright collisions between domestic and foreign law — collisions both hard on the people caught in the cross-fire and a potential source of friction between the United States and foreign countries — lies behind the presumption against the extraterritorial application of federal statutes . . . .<sup>60</sup>

Yet another explanation is more historical. One author wrote with reference to Holmes' opinion in *American Banana*: "This reticence to give legislation any extraterritorial effect without a clear congressional directive doubtless was enhanced by the isolationist climate of the United States during the 19th and early 20th centuries."<sup>61</sup>

The outcome of *Boureslan* turns on how strong the *Foley* presumption is and what is required to overcome it; this is the major point of disagreement between the majority and the dissent. The majority admitted that evidence of "contrary intent" need not be expressed by the legislature, for by its terms *Foley* contemplated that this "canon of construction . . . is a valid approach whereby *unexpressed* congressional intent may be ascertained."<sup>62</sup> But the *Boureslan* majority was looking for a clear expression of an affirmative intention to deal with international conditions or even "affirmative congressional intent."<sup>63</sup> Without that it felt obliged to presume that Congress was "primarily concerned with domestic conditions."<sup>64</sup>

### III. JUSTICE MARSHALL'S DISSENT

#### A. Weakness of Presumption

The dissent began by accusing the majority of "grossly distort[ing] the effect of [the *Foley* rule] of construction upon [the] conventional techniques of statutory interpretation."<sup>65</sup> This objection to the majority's use of *Foley* was fundamental, because *Foley* "supplies the driving force of the majority's analysis . . . ."<sup>66</sup>

The dissent's prime thrust was at the majority's understanding of the presumption against extraterritoriality.<sup>67</sup>

[C]ontrary to what one would conclude from the majority's analysis, this canon is *not* a "clear statement" rule, the application of which relieves a court of the duty to give effect to all available indicia of the legislative will. Rather . . . a court may properly rely on this presumption only after exhausting all of the traditional tools "whereby unexpressed congressional intent may be ascertained."<sup>68</sup>

60. *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554, 557 (7th Cir. 1985) (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949)). This rationale is adopted by the majority in *Boureslan* with a cite to *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963).

61. Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1009 n.23 (1976).

62. *Boureslan*, 111 S. Ct. at 1230 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)) (emphasis added).

63. *Id.* at 1231.

64. *Id.* (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

65. *Id.* at 1237 (Marshall, J., dissenting).

66. *Id.*

67. *Id.*

68. *Id.* (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

The dissent objected to the majority's "conversion" of the presumption into a clear-statement rule,<sup>69</sup> by explaining that "[c]lear statement rules operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently strong* legislative intent to displace them."<sup>70</sup> A valid use of a clear statement rule would include, for example, the requirement that a federal statute manifest a clear intention to condition participation on a state's consent to waive its constitutional immunity.<sup>71</sup> Other examples include cases involving a wholly independent rule of construction known as the *Charming Betsy* rule: "[T]hat an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."<sup>72</sup> The dissent accurately pointed out that *Benz v. Compania Naviera Hidalgo, S.A.*<sup>73</sup> and *McCulloch v. Sociedad Nacional de Marineros de Honduras*,<sup>74</sup> cited by the majority in support of a strong presumption, actually turned on the clashing of American and foreign law, as well as on an utter lack of evidence of congressional intent.<sup>75</sup>

The dissent did refer to the *Foley* rule as a presumption, but insisted that it could be overcome with the standard tools used for discerning legislative intent, including the words of the statute, legislative history, and comparison with other statutes.<sup>76</sup> The dissent also gave much more credence and deference to the EEOC's position regarding the matter.<sup>77</sup>

The same struggle to evaluate the strength of the presumption was played out in the Fifth Circuit *Boureslan* opinions.<sup>78</sup> The en banc majority stated: "The presumption against extraterritorial application establishes a high hurdle for [*Boureslan's*] arguments to overcome,"<sup>79</sup> requiring a "clear congressional expression of intent to the contrary."<sup>80</sup> Judge King, who dissented to both the panel and the en banc decisions, quibbled with the formulation of the presumption adopted by the majority, by the Restatement (Third) of Foreign Relations<sup>81</sup> and by the earlier Fifth Circuit case of *State v. Mitchell*.<sup>82</sup> Judge King could not resist pointing

69. *Id.* at 1238.

70. *Id.*

71. *Id.* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)(interpretation of Rehabilitation Act of 1973).

72. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Judge King, dissenting on the Fifth Circuit, had already warned of possible confusion of the related but different doctrines of *Foley* and *The Charming Betsy*. *Boureslan*, 857 F.2d at 1023 n.7.

73. 353 U.S. 138 (1957). "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed." *Id.* at 147.

74. 372 U.S. 10 (1963).

75. *Boureslan*, 111 S. Ct. at 1239 (Marshall, J., dissenting).

76. *Id.* at 1237 (Marshall, J., dissenting).

77. See *infra* notes 118-19 and accompanying text.

78. *Boureslan*, 857 F.2d at 1014.

79. *Id.* at 1021.

80. *Id.* at 1017.

81. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987). The Restatement adopted and strengthened the presumption, but also made it by its terms subject to the effects exception. See *infra* notes 180-202 and accompanying text.

82. *Boureslan*, 875 F.2d at 1021-25 (King, J., dissenting) (citing *State v. Mitchell*, 553 F.2d 996 (5th Cir. 1977)).

out: "Though *Mitchell* cites *Steele* and *Foley Bros.* as support for its formulation of the presumption, neither case requires that Congress' expression of 'contrary intent' be 'clear.'" <sup>83</sup>

She went on to point out that *Foley* itself establishes that the presumption need not be overcome by express language, but may be overcome by any "ascertainable" congressional intent. <sup>84</sup> Thus, "[e]ven if we add the adjective 'clear' to our formulation of the presumption, . . . 'clear' does not mean 'express' . . . ." <sup>85</sup>

### *B. Marshall's Preferred Result*

The dissenters on the Supreme Court would have used the broad jurisdictional language of Title VII, and more directly, the alien exemption provision, to hold that "Congress did *in fact* expect Title VII's central prohibition to have an extraterritorial reach." <sup>86</sup>

The jurisdictional language of Title VII states that an employer is subject to Title VII if it has fifteen or more employees and "is engaged in an industry affecting commerce." <sup>87</sup> "Commerce" is defined as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof . . . ." <sup>88</sup> Respondents had offered several alternative interpretations of this language. <sup>89</sup> The majority judged that: "Each [interpretation of the broad language] is plausible, but no more persuasive than that." <sup>90</sup> The Court then cited two cases in which it had refused to find extraterritorial jurisdiction for statutes which had expressly referred to foreign commerce in their jurisdictional sections. <sup>91</sup> The majority also pointed out that Title VII's jurisdictional language is "boilerplate" and is included in "any number of congressional acts, none of which have ever been held to apply overseas." <sup>92</sup> More specifically, the majority included a sentence asserting that "Title VII's definition of 'com-

83. *Id.* at 1022 n.3 (King, J., dissenting).

84. *Id.* at 1022 (King, J., dissenting).

85. *Id.* (King, J., dissenting).

86. *Boureslan*, 111 S. Ct. at 1237 (Marshall, J., dissenting). The crucial difference between the majority and the dissent is shown here:

While conceding that it is "plausible" to infer from the breadth of the statute's central prohibition that Congress intended Title VII to apply extraterritorially, the majority goes to considerable lengths to show that this language is not sufficient to overcome the majority's clear-statement conception of the presumption against extraterritoriality.

*Id.* at 1240.

87. 42 U.S.C. § 2000e(b)(1988).

88. 42 U.S.C. § 2000e(g)(1988).

89. *Boureslan*, 111 S. Ct. at 1231. Respondents made the fairly persuasive argument that language in the first bill considered by the House of Representatives contained the terms "foreign commerce" and "foreign nations", and that those terms subsequently had been deleted by the Senate before passage. The majority seemed not to be particularly persuaded by this argument, and listed it last in a paragraph setting forth respondents' arguments. *Id.*

90. *Id.*

91. *Id.* at 1232 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) (National Labor Relations Act ("NLRA")); *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29 (1925) (Federal Employers Liability Act)). These two labor acts are more domestic in focus than is Title VII. See *id.* at 1241-46 (Marshall, J., dissenting); see also *infra* note 212 for discussion of Judge King's dissents to the Fifth Circuit opinions.

92. *Boureslan*, 111 S. Ct. at 1232.

merce' was derived expressly from the [Labor-Management Reporting and Disclosure Act]"<sup>93</sup> which this Court had held, prior to the enactment of Title VII, did not apply abroad.<sup>94</sup> The dissent, on the other hand, agreed with petitioners that the plain meaning of these words encompassed United States employers operating beyond United States borders.<sup>95</sup>

The dissent was even more persuaded that Congress intended Title VII to apply outside the United States because Congress included the alien exemption provision.<sup>96</sup> Justice Marshall wrote: "Absent an intention that Title VII *apply* 'outside any state,' Congress would have had no reason to craft this extraterritorial [alien] exemption."<sup>97</sup>

At least two interpretations emerge from a common sense reading of the words: "This subchapter shall not apply to . . . the employment of aliens outside any State."<sup>98</sup> Congress may have intended that the subchapter apply to citizens but not to aliens outside any State, or that the subchapter apply to aliens inside but not outside any State. The Court validated that second interpretation with one sentence in *Espinoza v. Farah Manufacturing Co.*,<sup>99</sup> where the Court found that Title VII protected aliens within the United States from discrimination.<sup>100</sup> The *Espinoza* Court's reasoning on this matter turned primarily on the use of the term "individual" rather than "citizen" in the jurisdictional definitions of the Act<sup>101</sup> and, secondarily, on the alien exemption provision.<sup>102</sup>

93. 29 U.S.C. §§ 401-531 (1988) ("LMRDA"). This statute regulates the internal operations of unions, and hence is arguably much more domestic in focus than is Title VII. See *infra* notes 140-44 and accompanying text.

94. *Boureslan*, 111 S. Ct. at 1233. This argument by Chief Justice Rehnquist is seriously flawed. He gave no authority other than *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 15 (1963), for this proposition. *McCulloch* dealt with the NLRA, not the LMRDA. The extraterritorial application of the LMRDA has not been determined, and indeed the question should rarely if ever arise given the LMRDA's concern with internal union affairs. Chief Justice Rehnquist's use of *McCulloch* is also problematic because that case determined that the NLRA did not apply on foreign flag ships despite statutory language referring to foreign commerce; *McCulloch* turned on the legislative history of the Act and on conflicts with international law. Chief Justice Rehnquist, in *Boureslan*, considered only the language of Title VII, and refused to consider either legislative history or international law. Thus he refused to use the tools allowed by the very case he was citing.

95. *Boureslan*, 111 S. Ct. at 1239 (Marshall, J., dissenting).

96. *Id.* at 1242 (Marshall, J., dissenting).

97. *Id.* at 1240 (Marshall, J., dissenting).

98. *Id.* at 1233 (quoting 42 U.S.C. § 2000e-1 (1970)). A third suggested reading put forward by respondents may not be as evident, and, as pointed out by the dissent, may weigh more heavily for petitioners than for respondents. The respondents suggested that the purpose of the provision is to exclude aliens in the possessions of the United States. "Thus the 'outside any State' clause means outside any State, but within the control of the United States." *Id.* The dissent responds:

This explanation may very well be true, but it only corroborates the conclusion that Congress expected Title VII to apply extraterritorially. Although there is no fixed legal meaning for the term "possession", it is clear that possessions, like foreign nations, are extraterritorial jurisdictions to which the presumption against extraterritorial application of a statute attaches.

*Id.* at 1242 (Marshall, J., dissenting) (citation omitted). At any rate the dissent cited evidence that the provision was drafted with "U.S. employers employing citizens of foreign countries in foreign lands" firmly in mind . . . . " *Id.* (citing S. REP. NO. 867, 88th Cong., 2d Sess. 11 (1964)).

99. 414 U.S. 86 (1973). The case is better known for its holding that Title VII does not prohibit discrimination on the basis of citizenship.

100. *Id.* at 95.

101. 42 U.S.C. § 2000e(a) (1970).

102. *Espinoza*, 414 U.S. at 95.

The dissenting judges rejected the contention that the provision indicates "merely that aliens are covered by Title VII if they are employed in the *United States*,"<sup>103</sup> and provided Court-watchers with another example of the growing acrimony on the Court: "This construction hardly makes sense of the statutory language as a whole; indeed, it hardly makes sense."<sup>104</sup> The dissent considered that under this analysis the alien exemption provision would be completely superfluous.<sup>105</sup>

More importantly, the dissent asserted, the legislative history of the alien exemption provision reveals exactly the intent petitioners sought to give it.<sup>106</sup> Several cases used by the majority had made heavy, if not exclusive, use of legislative history in determining legislative intent to apply statutes extraterritorially.<sup>107</sup> The dissent therefore seized on statements made by the drafters of Title VII, including quotes from the Senate Report that the provision was "directed at '*U.S. employers employing citizens of foreign countries in foreign lands*' " and from the House Report explaining that the provision "applies to 'employment of aliens outside the United States by an *American enterprise*.'" <sup>108</sup> This answers two of the majority's questions: Congress was contemplating obligations of enterprises outside the United States, but was not contemplating any but American enterprises abroad.<sup>109</sup>

Other historical evidence strengthened the dissent's position. "The language comprising the alien-exemption provision first appeared in an employment discrimination bill introduced only seven weeks after the Court decided *Foley Brothers* [in 1949] . . . ." <sup>110</sup> The *Foley* Court's refusal to give extraterritorial reach to the Eight Hour Law was in large part due to the absence of any distinction between citizen and alien labor.<sup>111</sup> Further, the history of that 1949 alien exemption provision shows that it was intended to resolve conflicts of law.<sup>112</sup>

The majority of the Court had not directly rejected petitioners' construction of the English language, but had rejected the idea that Congress intended extraterritorial application because Congress had failed to address various problems which would arise from extraterritorial application of Title VII.<sup>113</sup> The majority was

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103. *Boureslan*, 111 S. Ct. at 1242 (Marshall, J., dissenting).

104. *Id.*

105. *Id.* "In addition to being extremely improbable, such a legislative subterfuge would have been completely unnecessary, for as we indicated in *Espinoza* . . . Congress clearly communicated its intent to cover aliens working in this country by prohibiting discrimination against 'any individual.'" *Id.* (citation omitted).

106. *Id.*

107. *E.g.*, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); see *supra* note 93.

108. *Boureslan*, 111 S. Ct. at 1244 (Marshall, J., dissenting)(quoting H.R. REP. NO. 570, 88th Cong., 1st Sess. 405, at 4 (1963), reprinted in *Civil Rights Hearings on H.R. 405, as amended, before Subcomm. No. 5 of the Comm. on the Judiciary House of Representatives*, 88th Cong., 1st Sess. 2303 (1963)).

109. *Id.*

110. *Id.* at 1241; see H.R. 4453, 81st Cong., 1st Sess. (1949).

111. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949).

112. H.R. REP. NO. 570, 88th Cong., 1st Sess. 405, at 4 (1963), reprinted in *Civil Rights Hearings on H.R. 7152, as amended, before Subcomm. No. 5 of the Comm. on the Judiciary*, 88th Cong., 1st Sess. 2303 (1963)(*Civil Rights Hearings*).

113. *Boureslan*, 111 S. Ct. at 1234.

troubled by the lack of specificity of the statute if, in fact, foreign jurisdiction was intended. How could an intent to apply the statute to foreign employers be ruled out? Why no mention of a conflict with foreign laws? Where were the mechanisms for overseas enforcement?

The dissent found these "supposed omissions" to be unpersuasive as arguments against extraterritoriality.<sup>114</sup> The majority's concern over conflicts with foreign law was unfounded precisely because the alien exemption provision had been included to prevent the most egregious conflicts.<sup>115</sup> Venue had been addressed by the drafters so as to accommodate United States enterprises abroad,<sup>116</sup> and the EEOC's investigative powers are sufficient although not broad.<sup>117</sup> At any rate, argued the dissent, "there simply is no correlation between the scope of an agency's subpoena power and the extraterritorial reach of the statute that the agency is charged with enforcing."<sup>118</sup>

Finally the dissent was astonished by the majority's failure to defer to the EEOC's interpretation of the clause.<sup>119</sup> The question of deference to the administrative agency charged with interpretation of the statute is beyond the scope of this article, but was Justice Scalia's sole point of disagreement with the majority.<sup>120</sup>

#### IV. FURTHER CRITIQUE OF THE MAJORITY

Justice Marshall persuasively argued that the majority, by failing to look at legislative history and other traditional interpretive tools, applied *Foley* so that the presumption became close to a clear statement rule.<sup>121</sup> He also cited congressional history for an interpretation of the alien exemption provision that indicates a congressional intent to apply Title VII abroad,<sup>122</sup> and he made the point that the EEOC was entitled to deference.<sup>123</sup>

But Justice Marshall missed the opportunity to explore fully the weakness of the *Foley* canon of construction. Research reveals that the strength of the so-called presumption waxes and wanes, and significant exceptions exist. The foundations of the rule are shaky in our modern world, especially in the context of human rights legislation. One commentator, who has been prolific in his critique of what

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114. *Boureslan*, 111 S. Ct. at 1243 (Marshall, J., dissenting).

115. *Id.* at 1244 (Marshall, J., dissenting). The statutory defense of the Bona Fide Occupational Qualification (BFOQ), 42 U.S.C. § 2000e-2(e)(1988), has also been interpreted to avoid conflicts of law.

116. *Boureslan*, 111 S. Ct. at 1243 (Marshall, J., dissenting) (citing 42 U.S.C. § 2000e-5(f)(3)(1970) allowing venue in "judicial district in which the [employer] has his principal office.").

117. *Id.* (Marshall, J., dissenting).

118. *Id.* at 1244 (Marshall, J., dissenting).

119. *Id.* at 1244-45 (Marshall, J., dissenting).

120. *Id.* at 1236-37 (Scalia, J., concurring).

121. *Boureslan*, 111 S. Ct. at 1237 (Marshall, J., dissenting).

122. Justice Marshall did not make use of the post-legislative history cited by Judge King in King's dissent to the Fifth Circuit opinions. In her dissent Judge King stated that when the Age Discrimination in Employment Act ("ADEA") was amended to apply extraterritorially, congressional testimony indicated that the ADEA was being brought into conformity with Title VII, which the congressmen thought applied extraterritorially. *Boureslan v. Aramco*, 892 F.2d 1271, 1281 (5th Cir. 1990)(King, J., dissenting).

123. *Boureslan*, 111 S. Ct. at 1246 (Marshall, J., dissenting).

could be called the counter-institutional canon, concluded: "The presumption is an excellent illustration of the danger of self-perpetuating canons of construction."<sup>124</sup> Courts since *Foley* have articulated more valid tests for determining whether statutes apply extraterritorially; these tests take into account a broader range of factors and are more thorough. Justice Marshall also failed to refer to the general rule that Title VII, as a remedial statute, should be interpreted broadly in favor of the plaintiff.

### A. *Foley's Flimsiness*

A review of case law suggests that the degree of clarity required by the courts to overcome the *Foley* presumption varies considerably with the situation, and that the presumption is at times easily toppled.<sup>125</sup> Many courts have cited *Foley* and mentioned its rule, sometimes calling it a "presumption" other times a "canon of construction,"<sup>126</sup> but often not giving it much more than lip service. For instance only four years after *Foley*, in *Steele v. Bulova Watch Co.*,<sup>127</sup> the Supreme Court applied the Lanham Act to acts committed in Mexico, without any "clear" expression of congressional intent other than a broadened commerce provision.<sup>128</sup>

In *Tamari v. Bache & Co. (Lebanon) S.A.L.*,<sup>129</sup> the Seventh Circuit neatly turned the presumption on its head. In trying to determine whether Lebanese citizens could sue other Lebanese citizens for violations of the Commodity Exchange Act, the court first took note of the presumption, then flipped its application:

Subject matter jurisdiction exists over this dispute only if the anti-fraud provisions of the Commodity Exchange Act were intended to apply to foreign brokers . . . . Looking to the language of the statute and its legislative history, we find no indication, however, that Congress intended to prohibit fraudulent dealings connected with futures trading on domestic exchanges only if the futures transactions originate in the United States.<sup>130</sup>

The Ninth Circuit, in a bankruptcy matter, refused the appellation of "presumption," reducing the *Foley* rule to something that "is sometimes said," and held that

124. Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U.L. REV. 339, 392 (1990).

125. For a thorough critique of the presumption, see Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U.L. REV. 598 (1990).

126. Judge Shadur of the Northern District of Illinois gives it no more status than a "notion." *Androux v. Gelderman, Inc.*, No. 89-C-4447, 1989 WL 27460 (N.D. Ill. Mar. 17, 1989). For an example of Judge Shadur's picturesque prose, see a later opinion in the same case, also unpublished, at *Androux v. Gelderman, Inc.*, No. 89-C-447, 1990 WL 125495 (N.D. Ill. Aug. 17, 1990).

127. 344 U.S. 280 (1952).

128. *Id.* at 280. An American corporation was allowed to bring an unfair competition and trademark infringement suit against another United States citizen for making watches in Mexico and stamping Bulova on them. This can partially be explained as an "effects" case. See *infra* notes 180-202 and accompanying text. Also, arguably unfair competition cases should be treated differently from employment situations. See *infra* note 139 and accompanying text. The *Boureslan* majority rejected the applicability of *Steele*. *Boureslan*, 111 S. Ct. at 1232.

129. 730 F.2d 1103 (7th Cir. 1984).

130. *Id.* at 1106. Later, the *Tamari* court restates the presumption to take into account the territorial effects exception, which better explains the holding. *Id.* at 1107 n.11.

defendants could be found guilty of fraudulent transfer and concealment of assets in Canada.<sup>131</sup>

The District Court of Hawaii had its turn in *Saipan v. United States Department of Interior*.<sup>132</sup> The issue was whether the government of trust territory in the Pacific Islands was exempt from judicial review under the Administrative Procedures Act ("APA") and immune from the National Environmental Policy Act ("NEPA").<sup>133</sup> The defendants urged the court to apply *Foley*, arguing NEPA had no language extending its coverage to the trust territory.<sup>134</sup> The court responded to this argument by stating: "I am not persuaded. In my opinion, defendants misconstrue the thrust of the canon by ignoring the qualifying phrase 'unless a contrary intent appears.'"<sup>135</sup> The *Saipan* court pointed out the irony of *Foley*, which exalted congressional intent to the point of ignoring Congress' express language.<sup>136</sup> Noting that the *Foley* Court looked at the Act as a whole, its legislative history, and the administrative interpretation of the Act rather than at the words of the legislators, the *Saipan* court did not adopt the "mechanical rule" proposed by the defendants.<sup>137</sup> Instead the court examined all available evidence of legislative intent before arriving at a decision.<sup>138</sup>

A year earlier, Judge Friendly had taken the same approach in a securities case:

Defendants' reliance on the principle stated in *Foley* . . . , that regulatory statutes will generally not be construed as applying to conduct wholly outside the United States, is . . . misplaced. However, it would be equally erroneous to assume that the legislature always means to go to the full extent permitted. This is a question of the interpretation of the particular statute . . . .<sup>139</sup>

Perhaps the varying strength of the *Foley* rule turns on the substantive matter before the court. Arguments have been made that labor statutes are more inherently domestic than others, such as antitrust and securities regulation statutes. If so, the presumption against extraterritoriality should be particularly strong for labor statutes.<sup>140</sup>

131. *Stegeman v. United States*, 425 F.2d 984, 985-89 (9th Cir. 1970), *cert. denied*, 400 U.S. 837 (1970).

132. 356 F. Supp. 645 (D. Haw. 1973).

133. *Saipan*, 356 F. Supp. at 648 (citing Administrative Procedure Act §§ 701-706 (1970); National Environmental Policy Act §§ 4321-4361 (1970)).

134. *Id.* at 649.

135. *Id.*

136. *Id.* at 649-50.

137. *Id.* at 650.

138. *Id.*

139. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972). The court held in *Maxwell* that the Securities Act was intended to protect against security fraud whether or not the securities were traded on United States markets, and regardless of whether the securities were issued by Americans. *Id.* at 1335-38.

140. See, e.g., *Cleary v. United States Lines, Inc.*, 728 F.2d 607, 609 (3d Cir. 1984) (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), and *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949), as evidence of a "general policy against extraterritorial application of labor laws"); *Accord Hodgson v. Union de Permissionarios Circulo Rojo, S. de R.L.*, 331 F. Supp. 1119 (D.C. Tex. 1971).



The better view distinguishes among the various labor statutes. Such an argument was attempted by the plaintiff in *Cleary v. United States Lines, Inc.*,<sup>141</sup> who was arguing for extraterritorial application of the ADEA before its amendment:

Plaintiff argues that there is good reason for restricting applicability of the provisions of the FLSA to workers employed in this country: if it were otherwise, wages required to be paid under the FLSA, where they varied greatly with the prevailing wage rate in the foreign country, would cause dislocations in the economy of the host country. Plaintiff contends that a similar threat to a foreign economy does not exist where our laws prohibiting age discrimination are extended to protect American employees working abroad.<sup>142</sup>

The *Cleary* court shared plaintiff's policy views, but felt justifiably constrained by express congressional language of the ADEA precluding extraterritorial application.<sup>143</sup>

Labor statutes with a civil rights thrust, which are in accord with international human rights agreements,<sup>144</sup> should not be considered to have the same narrow domestic scope as more picayune labor regulations. For that reason, despite the *Boureslan* majority's heavy reliance on *Foley*, *Foley's* specific holding regarding the Eight Hour Law is not necessarily applicable to Title VII. First, Title VII is not particularly analogous to the Eight Hour Law, for Title VII is broader in scope and the effect of its violations abroad is more surely felt in the United States.<sup>145</sup> Also the absolute wording of the Eight Hour Law might well clash with foreign hour limitations, whereas most nations of the world have expressed commitment to non-discriminatory workplaces.<sup>146</sup> Insofar as an actual conflict of laws might arise, Title VII provides the flexible defense of the Bona Fide Occupational Quali-

141. 728 F.2d 607 (3d Cir. 1984).

142. *Cleary v. United States Lines, Inc.*, 555 F. Supp. 1251, 1259 (D.N.J. 1983), *aff'd*, 728 F.2d 607 (3d Cir. 1984)(emphasis added).

143. *Cleary v. United States Lines, Inc.*, 728 F.2d 607, 608 (3d Cir. 1984). The ADEA is part of the FLSA, which at the time *Cleary* was decided specifically exempted companies operating on foreign soil.

Section 7 of the ADEA, 29 U.S.C. § 626, provides that "[t]he provisions of this chapter [the ADEA] shall be enforced in accordance with the powers, remedies, and procedures provided in section 211(b), 216 (except for subdivision (a) thereof) and 217 of this title . . . ." The provisions referenced are part of the FLSA. Section 16(d), 29 U.S.C. § 216(d), provides that "no employer shall be subject to any liability or punishment . . . on account of his failure to comply with any provision of such Acts (1) with respect to work . . . performed in a work place to which the exception in section 13(f) of this title is applicable." Section 13(f), 29 U.S.C. § 213(f), in turn provides that the acts covered by it shall not apply "to any employee whose services during the workweek are performed in a work place within a foreign country . . . ."

*Cleary*, 728 F.2d at 608. The ADEA was later amended expressly to provide for extraterritorial application. All courts considering the extraterritoriality of the ADEA before amendment agreed that it could not be applied to acts committed on foreign soil. See, e.g., *Lopez v. Pan Am World Serv.*, 815 F.2d 1118 (11th Cir. 1987); *Zahouric v. Arthur Young and Co.*, 750 F.2d 827 (10th Cir. 1984); *Thomas v. Brown & Root, Inc.*, 745 F.2d 279 (4th Cir. 1984). But because of the peculiar statutory scheme of the ADEA, Judge Posner found the statutory language less unequivocal than the Third, Fourth and Tenth Circuits had. He nonetheless came to the conclusion that the ADEA should not have extraterritorial reach. *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985).

144. See *infra* notes 222-26 and accompanying text.

145. See *infra* notes 180-202 and accompanying text.

146. See *infra* note 224.

fication ("BFOQ"), which should preclude head-on collisions of law.<sup>147</sup> Also, administrative interpretation of Title VII supported extraterritorial jurisdiction and was contrary to the Court's decision, whereas in *Foley* the administrators and the Court were in agreement.

*B. A Chorus of Authority in Favor of Extraterritorial  
Application of Title VII*

Other courts, the EEOC, the Justice Department and most scholars did not find *Foley* determinative when they addressed the question of whether Title VII applied to occurrences outside the United States.

1. Case Law

Aramco's treatment of Ali Boureslan resulted in not only the first Supreme Court statement on the extraterritoriality of Title VII, but also the first circuit court opinions on the subject. Until then only trial courts had grappled with the question. Most notably, the New Jersey District Court in *Bryant v. International Schools Services*<sup>148</sup> had allowed extraterritorial application of Title VII, using the same reasoning proffered by petitioners but rejected by the Supreme Court in *Boureslan*,<sup>149</sup> namely: "Congress has the power to extend the reach of its laws to American citizens outside the geographical boundaries of the United States . . ." <sup>150</sup> and in drafting Title VII, Congress evidenced that by including the alien exclusion provision.<sup>151</sup> The *Bryant* court cited *Love v. Pullman Co.*,<sup>152</sup> the first published case to address the extraterritoriality question, albeit in a footnote.

Although *Bryant* was overruled on other grounds and the reviewing court did not affirm its reasoning on extraterritoriality,<sup>153</sup> the *Bryant* court's reasoning regarding the extraterritoriality issue had been adopted by the Maryland District Court.<sup>154</sup> In *Seville v. Martin Marietta Corp.*,<sup>155</sup> American citizens alleged gender

147. 42 U.S.C. § 2000e-2 nn.31-66 (1988).

148. 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982).

149. *Bryant*, 502 F. Supp. at 482.

150. *Id.*

151. *Id.* The entire logical path turns on the negative implication of the alien exclusion provision. According to the court, this is what distinguishes Title VII from other labor statutes which have been held not to apply extraterritorially. *Id.*

152. *Id.* (citing *Love v. Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. 1976)).

This discussion assumes that the porters in Montreal were not American citizens. American citizens who were employed by Pullman in Canada are entitled to full relief without any subtraction. This conclusion rests on the negative inference of [the alien provision] . . . . Since Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to American citizens employed outside of any state in an industry affecting commerce by an employer otherwise covered under the act. Nothing in the legislative history addresses this specific point, but neither is it contraindicated. Our research has revealed no cases directly in point. An additional support for this interpretation comes from the international or extraterritorial application of the antitrust laws.

*Id.* n.4 (citation omitted).

153. *Bryant v. International Schools Serv. Inc.*, 675 F.2d 562 (3d Cir. 1982).

154. *Seville v. Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986).

155. *Id.*

discrimination against Martin Marietta in Frankfurt, West Germany.<sup>156</sup> The court allowed the plaintiffs to bring Title VII suits, citing *Bryant* and *Love*, and stating "[t]hese decisions are soundly reasoned and this Court adopts their logic."<sup>157</sup>

*Bryant* is also in line with dicta and implications in other cases where the reach of Title VII to acts committed abroad was not questioned.<sup>158</sup> Until *Aramco* challenged Ali Boureslan's claim of subject matter jurisdiction, every judicial body to look at the matter had decided that Title VII applied to protect United States citizens employed by American companies outside the United States.<sup>159</sup>

## 2. EEOC and Justice Department Interpretations

Until the Supreme Court settled the matter in *Boureslan*, the EEOC had taken the position that Title VII could be applied extraterritorially to American corporations abroad and even to foreign corporations if certain minimum contacts were found.<sup>160</sup> The Justice Department had been on record since 1975 as holding the same view.

In 1985 the EEOC dealt with sex and national origin discrimination charges against two American corporations,<sup>161</sup> designated "Respondent A" and "Respondent B." B's stock was wholly owned by A, which had only one "purely informational" office in the United States; A's primary facility and work force were

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156. *Id.* at 591-92.

157. *Id.* at 592.

158. See *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986); *Mas Marques v. Digital Equip. Corp.*, 637 F.2d 24 (1st Cir. 1980); *Kern v. Dynaelectron*, 577 F. Supp. 1196 (N.D. Tex. 1983); *EEOC v. Institute of Gas Tech.*, 23 Fair Empl. Prac. Cas. (BNA) 825 (N.D. Ill. 1983). But the Southern District of Ohio mentioned *Love* and *Bryant* with some disapproval in *Lavrov v. NCR Corp.*, 600 F. Supp. 923, 931 (S.D. Ohio 1984), a case which came to the conclusion that Congress had not intended Title VII to apply to employment practices of foreign corporations outside the United States even if the foreign corporation was the subsidiary of an American company. The *Lavrov* court did state that it would "assume for present purposes, that Title VII reaches extraterritorial discrimination by American employers." *Lavrov*, 600 F. Supp. at 932 n.6. However, since the defendants did not raise the question of extraterritorial application in their motion for summary judgment, the court did not express an opinion regarding it. *Id.* n.6.

159. Since the *Boureslan* Fifth Circuit en banc decision has come down, reaction has been mixed. Recently *Akgun v. Boeing*, 53 Empl. Prac. Dec. (CCH) ¶ 40,011 (W.D. Wash. 1990), allowed American citizens to sue an American company for alleged discrimination which took place in Turkey. The district court noted that it was "unpersuaded" by the *Boureslan* majority of the Fifth Circuit en banc, and adopted Judge King's analyses. *Id.* On the other hand, *Boureslan* was cited without disapproval in *Theus v. Pioneer Hi-Bred Int'l, Inc.*, 738 F. Supp. 1252, 53 Fair Empl. Prac. Cas. (BNA) 103 (S.D. Iowa 1990) and *EEOC v. Kloster Cruise Ltd.*, 53 Fair Empl. Prac. Cas. (BNA) 1239 (S.D. Fla. 1990). Also, while *Boureslan* was cited with approval in *EEOC v. Bermuda Star Line*, 744 F. Supp. 1109, 53 Fair Empl. Prac. Cas. (BNA) 836 (M.D. Fla. 1990), it was held not to apply to the facts of that case.

160. Chief Justice Rehnquist suggested that because the EEOC has changed its mind on this issue, the EEOC's interpretation was owed less deference. *Boureslan*, 111 S. Ct. at 1235 (citing *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)). Before 1980 the EEOC's regulations asserted that Title VII "protects all individuals, both citizens and non-citizens, domiciled or residing in" the United States. *Id.* By negative inference the EEOC was conceding lack of jurisdiction over citizens living abroad. See *id.* The "domiciled or residing" language was deleted in 1980, and evidently the EEOC began asserting jurisdiction. *Id.* at 1235-36. Certainly by 1980 the EEOC had sought and received a subpoena duces tecum in a case involving discrimination in Algeria by a United States company against a United States citizen. *EEOC v. Institute of Gas Technology*, 23 Fair Empl. Prac. Cas. (BNA) 825 (N.D. Ill. 1980); see generally, Kirschner, *The Extraterritorial Application of Title VII of the Civil Rights Act*, 34 LAB. L.J. 399 (1983).

161. EEOC Dec. No. 85-16, 2 Empl. Prac. Guide (CCH) ¶ 6857, at 7070-75 (Sept. 16, 1985).

located in a foreign country, and its assets were wholly owned by the government of a foreign country.<sup>162</sup> B had offices only in the United States.<sup>163</sup>

Respondent A objected to the court's jurisdiction.<sup>164</sup> A claimed that it was not "doing business" in the United States and that the allegedly discriminatory practices involved employment outside the United States.<sup>165</sup> A asserted that because the Act did not have extraterritorial application, the matters complained of fell outside the coverage of the Act.<sup>166</sup>

Answering the question of extraterritorial application, the EEOC followed the *Love* and *Bryant* decisions.<sup>167</sup> The EEOC found that Title VII did not exclude from its jurisdiction the discriminatory practices against United States citizens employed outside the United States.<sup>168</sup> A "fair interpretation" of the language of the alien provision leads to the conclusion that Congress intended to protect United States citizens working abroad.<sup>169</sup>

The EEOC went on to discuss the circumstances under which Title VII applied to allegedly discriminatory employment practices occurring outside the United States.<sup>170</sup> The limits of jurisdiction should be determined by the minimum personal jurisdiction contacts cases like *International Shoe Co. v. Washington*<sup>171</sup> and *Shaffer v. Heitner*.<sup>172</sup> The EEOC examined the "connection" between the United States and the alleged discrimination, and decided that the mere fact that a United States citizen made the charge linked the United States to the alleged discrimination.<sup>173</sup> The EEOC then addressed the factual question of whether the requisite re-

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162. *Id.* at 7071.

163. *Id.* All of A's employees who were not nationals of A's host country were classified as either "regular" or "casual" employees; "casual" employees were defined as the wives of regular employees, so, by definition, all were female. Due to company rules, no casual employees were nationals of the host country. Casual employees did not have the opportunity to participate in its pension and savings plans, thus leading to the Title VII suit. *Id.* at 7071.

A pointed to provisions of the host country's law which prohibited employment of dependents of expatriate employees, and which required that foreign workers not be paid more than nationals performing comparable work unless necessary to attract the foreign worker. *Id.* A had negotiated an exception to the first provision, and thought that the wives should be grateful to it for a chance to work at all. *Id.* As to A's comments on the second provision, the EEOC reported:

Since casual employees are already in the country with their spouses and are hired locally — unlike regular expatriate employees, who are expressly brought into country to work — Respondent A concludes that incentives paid to regular employees to secure their services in that country are not applicable to casual employees.

EEOC Dec. No. 85-16, 2 Empl. Prac. Guide (CCH) ¶ 6857, at 7071 (Sept. 16, 1985).

A's second point may be a poorly articulated defense on the grounds that it was complying with foreign law. Certainly Congress, in revising Title VII, should make explicit that compliance with foreign law is a complete defense. See *infra* note 261 and accompanying text.

164. EEOC Dec. No. 85-16, 2 Empl. Prac. Guide (CCH) ¶ 6857, at 7071 (Sept. 16, 1985).

165. *Id.*

166. *Id.*

167. *Id.* at 7072.

168. *Id.*

169. EEOC Dec. No. 85-16, 2 Empl. Prac. Guide (CCH) ¶ 6857, at 7072 (Sept. 16, 1985).

170. *Id.* at 7073.

171. 326 U.S. 310 (1945).

172. 433 U.S. 186 (1977).

173. EEOC Dec. No. 85-16, 2 Empl. Prac. Guide (CCH) ¶ 6857, at 7073 (Sept. 16, 1985).

lationship between A and the United States had been established in accordance with the case-by-case analysis of *International Shoe*, and found that it had.<sup>174</sup>

In 1988, the EEOC reiterated its views in a Policy Statement, where it spelled out its policies on the meshing of employment law and international law.<sup>175</sup> Citing the comments of Congressman Libonati,<sup>176</sup> and the *Bryant*<sup>177</sup> and *Love*<sup>178</sup> decisions, the EEOC wrote that it considered that Title VII did apply extraterritorially.<sup>179</sup> The EEOC statement reveals a far more expansive view of Title VII jurisdiction than that at issue in *Boureslan*: the policy statement includes an assertion of jurisdiction over foreign employers if they do business in the United States and if the discriminatory act is connected to the United States business. The policy statement does place some limits on whether United States corporations can be held accountable under Title VII. The company must not only be incorporated in the United States,<sup>180</sup> but "must also conduct some further business here."<sup>181</sup> The EEOC noted that because of its remedial nature, Title VII should be broadly construed.<sup>182</sup>

### 3. Scholarly Commentary

In the eyes of most scholars of both employment law and international law, the words of Title VII as written express sufficient intent to apply its provisions abroad.<sup>183</sup> Indeed the reporters to the Restatement approvingly cite *Bryant* as es-

174. EEOC Dec. No. 85-16, 2 Empl. Prac. Guide (CCH) ¶ 6857, at 7074 (Sept. 16, 1985). It found these contacts by looking to: A's American incorporation; its maintenance of an office and an agent for service of process here; the funding of its pension plans by American companies; its decision to invoke "the benefits and protections of the law of the state where Respondent B is located by expressly providing in its agreement with Respondent B that the laws of that state would govern matters pertaining to their contract, including the extraterritorial acts of the parties in performing the contract;" and its purposeful availment of the privilege of employing United States citizens by creating Respondent B (which "performs numerous services for Respondent A in the U.S., including recruiting and training individuals from the United States for employment overseas by A"). *Id.*

175. EEOC Policy Statement: *Application of Title VII to American Companies Overseas and to Foreign Companies*, (BNA) No. 641, at 405:6663 (1988) [hereinafter 1988 EEOC Policy Statement].

176. 110 CONG. REC. 2737 (1964). Congressman Libonati was a member of the Judiciary Committee who sponsored the bill which became Title VII. EEOC Policy Statement at 405:6663. This evidence is of course undercut by the fact that the Senate deleted the words "foreign commerce" before passing the Act. *See supra* note 89.

177. *Bryant v. International Schools Serv. Inc.*, 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982).

178. *Love v. Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. 1976).

179. EEOC Policy Statement at 405:6664 n.2.

180. "By incorporating within any state in the United States, a company invokes the benefits, privileges and protections of U.S. laws and in turn may be subject to those laws, including Title VII." EEOC Policy Statement at 405:6668. The EEOC considered place of incorporation to be only one factor in determining the nationality of a company. *Id.*

181. EEOC Policy Statement at 405:6668.

182. EEOC Policy Statement at 405:6664. *See infra* notes 237-50 and accompanying text.

183. Brillmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1320 n.27 (1981); Street, *Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad*, 19 INT'L LAW. & POL. 357 (1987); Note, *Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise*, 73 GEO. L.J. 1465, 1497 (1985) ("Title VII may be applied to extraterritorial employment discrimination only to the extent that such application conforms with established principles of international jurisdiction."); Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L. REV. 1288 (1987).

established authority.<sup>184</sup> One casenote author considered the matter settled: "Although not yet explicitly ruled on by the United States Supreme Court, this conclusion, that United States citizens working abroad are covered by United States anti-discrimination laws, has been implicitly reached by several federal courts and no longer seems to be an issue in current cases."<sup>185</sup>

Most commentators have criticized the majority opinions of the Fifth Circuit in *Boureslan*, the opinion affirmed by the Supreme Court.<sup>186</sup> Those agreeing with the majority have nonetheless recommended congressional action.<sup>187</sup>

### C. Exceptions to the Foley Rule

The Restatement (Second) of Foreign Relations, Section 38, articulated the *Foley* rule as follows: "Rules of United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute."<sup>188</sup> This is quite a strong statement of the presumption, close to a clear expression rule. But an exception to the rule leaps out at the reader of this section. By its own terms, the presumption may not be applicable to the situation presented by *Boureslan*. If Aramco's alleged acts had sufficient effects within the territory of the United States, petitioners were not really seeking extraterritorial application of Title VII. Or if it could be proven that Aramco entered into a conspiracy in the United States to violate Mr. Boureslan's Title VII rights, or if Mr. Boureslan was sent to Saudi Arabia for the express purpose of avoiding Title VII jurisdiction, Title VII should apply.

#### 1. Territorial Effects Exception

In *Laker Airways v. Sabena, Belgian World Airlines*,<sup>189</sup> complicated international jurisdictional matters were raised in an antitrust suit brought by Freddy Laker against various airlines.<sup>190</sup> The court pointed out:

In the context of remedial legislation, prohibition of effects is usually indivisible from regulation of causes. Consequently, the principles underlying territorial juris-

184. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 721 reporter's note 13 (1987).

185. Note, *United States Corporations Operating in Saudi Arabia and Laws Affecting Discrimination in Employment: Which Law Shall Prevail?*, 8 LOY. L.A. INT'L & COMP. L.J. 135, 138 (1985).

186. Strickler, *Employment Discrimination*, 21 TEX. TECH. L. REV. 231, 244-48 (1990) ("Judge King has by far the better of this argument."); Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U.L. REV. 339 (1990); Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U.L. REV. 598 (1990); Note, *Jurisdiction—Extraterritorial Application of U.S. Statute Proscribing Employment Discrimination—Congressional Intent: Boureslan v. Aramco*, 83 AM. J. INT'L LAW 375 (1989); Comment, *Boureslan v. Aramco Equal Employment Opportunity for U.S. Citizens Abroad*, 12 FORDHAM INT'L L.J. 564 (1989).

187. Note, *Hands Across the Water: Should Title VII of the Civil Rights Act of 1964 Have Extraterritorial Application?*, 12 Hous. J. INT'L L. 125 (1989); Note, *Same Boss, Different Rules: An Argument for Extraterritorial Extension of Title VII to Protect U.S. Citizens Employed Abroad by U.S. Multinational Corporations*, 30 VA. J. INT'L L. 479 (1990).

188. RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 38 (1965).

189. 731 F.2d 909 (D.C. Cir. 1984).

190. *Id.*

diction occasionally permit a state to address conduct causing harmful effects across national borders . . . . [C]onduct outside the territorial boundary which has or is intended to have a substantial effect within the territory may also be regulated by the state.<sup>191</sup>

This ability to regulate extraterritorial conduct producing effects within the territory has been available throughout this century, and has been most recently enunciated in Section 402(1)(c) of the Restatement (Third) of Foreign Relations:

Subject to § 403 [prescribing the limits of "reasonable" exercise of jurisdiction], a state has jurisdiction to prescribe law with respect to

. . . .

(1) (c) conduct outside its territory that has or is intended to have substantial effect within its territory.<sup>192</sup>

191. *Id.* at 921-22.

192. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(1)(c) (1986). In *Strassheim v. Daily*, 221 U.S. 280 (1911), Justice Holmes wrote:

If a jury should believe the evidence and find that Daily did the acts . . . , the usage of the civilized world would warrant Michigan in punishing him, although he never had set foot in the State until after the fraud was complete. Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the causes of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.

*Daily*, 221 U.S. at 284-85.

"The traditional example of this principle is that of the transnational homicide: when a malefactor in State A shoots a victim across the border in State B, State B can proscribe the harmful conduct." *Laker Airlines*, 731 F.2d at 922.

See also *Ramirez & Feraud Chili Co. v. Las Palmas Food Co.*, 146 F. Supp. 594, 600 (S.D. Cal. 1956), *aff'd*, 245 F.2d 874 (9th Cir. 1957), *cert. denied*, 355 U.S. 927 (1958) ("[I]nherent in national sovereignty is the power to impose, even upon foreigners owing no allegiance, liability for acts done abroad which proximately cause damage within the territorial limits of the sovereign."); *Accord* *United States v. Muench*, 694 F.2d 28, 33 (2d Cir. 1982), *cert. denied*, 461 U.S. 908 (1983).

This doctrine is reflected in both the Second and Third Restatements of Foreign Relations. The differences between the Restatements is discussed in *National Transp. Safety Bd. v. Carnival Cruise Lines, Inc.*, 723 F. Supp. 1488, 1490-91 (S.D. Fla. 1989), a case involving the enforcement of subpoenas in an investigation of a marine accident:

According to the most recent Restatement, the "effects doctrine" provides jurisdiction to prescribe law with respect to conduct outside the territory of a state if the conduct has a "substantial effect within its territory," and the exercise of such jurisdiction is not "unreasonable." However, the previous Restatement, which was widely accepted, imposed a more stringent standard for the exercise of jurisdiction based upon the "effects doctrine." According to the Second Restatement, a state may only exercise jurisdiction on this basis when the conduct that occurs outside its territory causes an effect within its territory that is "substantial," and "occurs as a direct and foreseeable result of the conduct outside its territory." Pursuant to either of these standards, however, it appears that Congress may indeed have jurisdiction to prescribe law authorizing investigations of accidents in circumstances such as this.

*Id.* (citations omitted); *Accord Pfeiffer*, 755 F.2d at 558; see also Note, *Age Discrimination—Extraterritorial Application of the Age Discrimination in Employment Act—Equal Employment Opportunity Commission Determines That a United States Corporation Operating in West Germany Is Subject to Suit Under the Age Discrimination in Employment Act—Employers Defense Based on Compliance with West German Law Rejected*, 20 GA. J. INT'L & COMP. L. 207, 212-13 (1990).

This effects doctrine cannot overcome express congressional language,<sup>193</sup> but the *Laker Airlines* court wrote: "The territorial effects doctrine is *not* an *extraterritorial* assertion of jurisdiction . . . . The only extraterritoriality about the transactions reached under the territorial effects doctrine is that not all of the causative factors producing the proscribed result may have occurred within the territory."<sup>194</sup> The court exercised jurisdiction because of the effect on American citizen consumers, the users of airlines.

Various courts agree with the assertion that reliance on the Foley presumption is misplaced "when conduct outside the United States could otherwise affect domestic conditions."<sup>195</sup> Judge Bork, when deciding whether an American accounting firm could be held for securities law violations in an audit report prepared for West German investors, framed the issue as: "American court jurisdiction over securities law claims against a defendant who acted in the United States when the securities transaction occurred abroad *and there was no effect felt in this country*."<sup>196</sup> Other courts use effects findings as part of their analysis of congressional intent.<sup>197</sup>

Justice Douglas, in his dissent to *Benz v. Compania Naviera Hidalgo*,<sup>198</sup> revealed that some version of the effects argument had been considered by that Court. The *Boureslan* majority relied on *McCulloch*, which in turn was dependent on the *Benz* analysis determining that the NLRA did not apply to foreign flag ships.<sup>199</sup> Justice Douglas argued that because foreign crew members were paid about one-third of the amount of American cash wages, and because foreign ships were in competition with American vessels, "[t]his case involves a contest between American un-

193. See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989) (finding that the alien tort statute did not apply against the Argentine Republic even though the alleged tort may have had effects in the United States because of specific statutory language); see also *Empresa Hondurena de Vapores v. McLeod*, 300 F.2d 222, 236 (2d Cir. 1962) (holding that despite the possibility of labor tensions on Honduran vessels in United States water would lead to American labor troubles, "that scarcely is decisive—the question still is how far Congress intended to permit the Board to intervene in what would normally be the affairs of a foreign government in order to prevent [American labor troubles].") This case was decided on writ of certiorari as *McCulloch v. Sociedad Nacional de Morineros de Honduras*, 372 U.S. 10 (1962), discussed *supra* at note 93.

194. *Laker Airlines*, 731 F.2d at 923.

195. *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1107 n.11 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984); see also *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.), *partially rev'd on other grounds*, 405 F.2d 215 (1968), *cert. denied*, 395 U.S. 906 (1969), concerning application of the Securities Act to sales of securities in Canada between foreign buyers and sellers, where the court stated:

In our view, neither the usual presumption against extraterritorial application of legislation nor the specific language of Section 30 (b) show Congressional intent to preclude application of the Exchange Act to transactions regarding stocks traded in the United States which are effected outside the United States, when extraterritorial application of the Act is necessary to protect American investors.

*Schoenbaum*, 405 F.2d at 206.

196. *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987) (emphasis added).

197. See, e.g., *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286 (1952) ("operations and their effects were not confined within the territorial limits of a foreign nation" thus, the Court held that the Lanham Act may be applied to wrongful use of the Bulova trademark in Mexico); *Stegeman v. United States*, 425 F.2d 984, 985-86 (9th Cir.), *cert. denied*, 400 U.S. 837 (1970); See also *Strassheim v. Daily*, 221 U.S. 280 (1980); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *Tamari v. Bache Co. (Lebanon) S.A.L.*, 730 F.2d 1103 (7th Cir. 1984). But see *Zahourek v. Arthur Young and Co.*, 750 F.2d 827, 829 (10th Cir. 1984).

198. 353 U.S. 138 (1957).

199. *Boureslan*, 111 S. Ct. 1227 (1991). See also *supra* note 94.



ions and a foreign ship . . . American unions, therefore, have a vital interest in the working conditions and wages of the seamen aboard this foreign vessel."<sup>200</sup> Thus, as often happens, the thorough argument of a dissenting justice strengthens and even broadens the effect of the decision the judge is dissenting from, by precluding distinguishing arguments.

No man is an island unto himself, especially in an increasingly global economy. Acts done in one country very often, even usually, produce some ripple effects in another country. A strong argument could be made that wherever it occurs in the world, wrongful discrimination against a United States citizen by an American company causes harmful effects within the territory of the United States. It is the unemployment statistics, the welfare rolls, and the employment climate of the United States which will be affected, rather than those of the host country. More specifically, members of the same protected class as the victim will be chilled in their desire to work for the company or to accept overseas stints. In many companies sojourns abroad are required for meaningful advancement. Failure to correct the *Boureslan* holding could result in a significant barrier to the advancement of the protected classes—the kind of barrier that Title VII was created to break down.<sup>201</sup>

Carried to the extreme, liberal application of the effects rule could lead to universal application of United States laws. United States courts, not yet ready for "One World," are hesitant to apply the effects doctrine to find jurisdiction over acts consummated abroad. The reasons they give for their reluctance to assert jurisdiction often return to *Foley* and its assumption that normally Congress has a domestic intent when it enacts most laws.<sup>202</sup> United States courts also fear a clashing of laws.<sup>203</sup> Thus, while many courts acknowledge the existence of the effects doctrine, few find jurisdiction after applying the rule. Nonetheless this doctrine is

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200. 353 U.S. at 147 (Douglas, J., dissenting).

201. Again, the wording and legislative history of Title VII and civil rights laws are significantly different from those of other labor laws. See *supra* notes 140-46 and accompanying text.

202. *Zoelsch*, 824 F.2d at 30-31 (Judge Bork, favoring restrictive approach to assuming jurisdiction).

203. See, e.g., *Empresa Hondurena*, 300 F.2d at 223-26. Judge Friendly considered whether the NLRB had the power to order a representation election on ships regulated by Honduran law, owned by a Honduran corporation, employing Honduran crews under a contract with a Honduran union. The ships regularly visited Honduras. Some ties to America existed. The Honduran corporation was a wholly owned subsidiary of a United States corporation, its officers were elected by its directors who were elected by the American parent and the vessels were engaged in the foreign commerce of the United States. He recognized that controversy over this commercial ship could lead to strike, and "burden or obstruct commerce," which is precisely what the NLRA was drafted to avoid. *Id.* at 236. "Last summer's strike of the American merchant marine, with which we have some familiarity . . . sufficiently demonstrates this." *Id.* (citation omitted). But, he concluded:

However, that scarcely is decisive—the question still is how far Congress intended to permit the Board to intervene in what would normally be the affairs of a foreign government in order to prevent this. Even if we were to make the unrealistic assumption that Congress was so far-seeing as not only to have contemplated the growth of flags of convenience when it adopted the Labor Act in 1935, but also to have anticipated cases where an American company would operate some ships under our own flag and others through foreign subsidiaries flying the flags of other countries, we see no basis for believing Congress would have chosen to solve the problem by an exercise of jurisdiction which would create such a conflict with a foreign government as would seem inevitable here.

*Id.* Thus again the fear of conflict of laws affects the question of whether American laws apply to offshore violations.

perhaps the most valid reason for finding that Title VII, remedial legislation intended to correct employment discrimination, should proscribe acts committed by Americans against Americans overseas.

## 2. Fraud Exception

Another exception to the general rule presuming only territorial application of United States laws is explained by Judge Posner in *Pfeiffer v. Wm. Wrigley Jr. Co.*<sup>204</sup>

All this is not to say, however, that if Pfeiffer had worked for Wrigley in the United States, and Wrigley to get around the Age Discrimination in Employment Act had moved him abroad in his last day (or week, or month — we need not explore the outer bounds of the limiting principle sketched here) and then fired him, it would be immune from liability under the Act. In that hypothetical case Pfeiffer's relevant work station would be (we may assume, without having to decide) the United States. This much flexibility the Act may have.<sup>205</sup>

Some years earlier the Fifth Circuit had made the same point, writing in *United States v. Mitchell*.<sup>206</sup>

[Some laws] are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.<sup>207</sup>

Under the *Mitchell* analysis, the presumption does not even arise if the law is of such a nature that its extraterritorial application is mandated.<sup>208</sup> This analysis could have been applied to Title VII. If one rung on the corporate ladder is the foreign stint, and if the purpose of Title VII is to ensure fair treatment at work, including on the corporate ladder, is not jurisdiction over the foreign rung mandated? Certainly when facts are present to support an allegation of intentional evasion of the scope of the statute, argument could be made that the nature of Title VII is such that if it is not given extraterritorial application, a fraud will be perpetrated on the court or on the legislature, because the purpose of the law will be frustrated.<sup>209</sup>

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204. 755 F.2d 554 (7th Cir. 1985).

205. *Pfeiffer*, 755 F.2d at 559.

206. 553 F.2d 996 (5th Cir. 1977).

207. *Id.* at 1002.

208. *Id.* The *Mitchell* court found that the Marine Mammal Protection Act of 1972 was *not* of such a nature that its extraterritorial application was mandated, at which point the *Foley* presumption arose. The court found that conservation statutes are of a territorial nature, as was "indicated by the conflict of national interests that is created by the attempt of one state to regulate resource development in another state." *Id.* at 1003 n.13.

209. See also *Stegeman*, 425 F.2d at 984.

### 3. Conspiracy Exception

Closely related to the fraud exception is the situation where plaintiff asserts that the discriminatory act actually occurred in the United States. The act, for these purposes, might be giving the order to discharge, demote, or harass,<sup>210</sup> or entering into a conspiracy originating within the United States.<sup>211</sup> This is not a successful exception if the statutory language expressly forbids jurisdiction abroad, as did the pre-amendment ADEA,<sup>212</sup> but is valid, if the facts permit, in Title VII cases.

#### D. A Better Approach to the Question of Extraterritoriality

The *Foley* presumption is weak and crippled with exceptions. It is regrettable that the majority opinion has given greater strength to the presumption than it had at its birth, for in fact the presumption is too blunt to handle the intricacies of a determination regarding whether a statute should be applied to acts overseas. Mechanical application of the presumption is like using an axe where a scalpel is required.

Several jurists, like Judge King of the Fifth Circuit, have appreciated that the question is too complex to be "solved" by the rote application of a tired presumption.<sup>213</sup> They have recognized the polycentric nature of the analysis. Perhaps the most comprehensive statement of how courts should go about determining whether a statute should be applied extraterritorially comes from *Air Line Stew-*

210. See, e.g., *Zahourek*, 750 F.2d at 829; *Cleary*, 728 F.2d at 610.

211. Cf. *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (Sherman and Wilson Acts).

212. *Cleary*, 728 F.2d at 610 n.6 (3d Cir. 1984).

Finally, appellant argues that the decision to discharge him was made in New York, not in London, and that therefore his cause of action does not depend on the extraterritorial application of the ADEA. The language of section 213(f), however, looks to the place of employment, not the place where the decision was made. Unless we are to accept one of appellants [sic] arguments that section 213(f) does not apply, this argument is irrelevant.

*Id.*

213. See *Boureslan*, 857 F.2d at 1024. Judge King correctly noted, in her dissent from the *Boureslan* panel decision: "In order to evaluate the complex issues raised in this case, we need a finer set of analytic tools than those employed in the majority opinion." *Id.*

In addition to rightly chastising the majority for handling the issue too rigidly and applying the "presumption" too mechanically, Judge King also considered that the majority had oversimplified the question. She suggested an alternative framework: the analysis should turn on the reasonableness of the exercise of jurisdiction. *Id.* at 1025.

She began with the Restatement § 403(1) which provides: "A state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." *Id.* at 1024 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(1)(1987)). Reasonableness, she continued, is to be considered in view of various factors set out in § 403(2). *Id.* If the exercise is unreasonable, then the majority's requirement of affirmative statement of congressional intent would be valid. If it is reasonable, "no express statement of Congress is required to overcome the presumption." *Boureslan*, 857 F.2d at 1024.

To restate, under Judge King's analysis, the first question is whether the exercise of jurisdiction is reasonable. The answer to this question determines the level of expressness of the congressional intent. The second question is then whether the expression of congressional intent rises to the appropriate level.

Applying this to Title VII, she found that the exercise of jurisdiction was reasonable, hence "express intent" need not be found. Judge King's approach is somewhat convoluted, and includes confusing use of § 403. That section's reasonableness test goes expressly to the power of the state to regulate, which is undisputed in *Boureslan*, rather than to whether or not the state in fact did seek to regulate conduct abroad when drafting Title VII.

*ards v. Trans World Airlines*,<sup>214</sup> in which the District Court of the Southern District of New York recognized that extraterritoriality is an ad hoc determination based on various competing concerns. The court stated:

The teaching of the Supreme Court decisions just considered is that, in resolving the question whether a particular federal statute is to be construed as possessing extra-territorial effect, the following factors must be evaluated: (1) whether the statutory language is vague or explicit as to the reach of the statute; (2) whether the statutory policies underlying the legislation were deliberately and consciously shaped with the existence or peculiarities of the foreign area in mind; (3) whether the legislative history of the statute evinces any specific congressional intention with respect to the subject of extra-territoriality; (4) whether the vindication of the public policy to be subserved requires extra-territorial operation; (5) whether the extra-territoriality of the statute is necessary for the effective regulation of the action of our citizens; (6) whether the defendant's acts were a device to evade the thrust of the statute by attempting to create a privileged sanctuary beyond our borders; (7) whether the legislation is a criminal statute or requires the upholding of the sovereign power of the United States; (8) whether the extra-territorial trade practices radiate unlawful consequences here notwithstanding that they were initiated or consummated outside the United States; (9) whether a substantial number of American citizens are within the extra-territorial area sought to be regulated; (10) whether the extra-territorial acts sought to be regulated occur on a geographical area over which the United States has some measure of territorial or legislative control, although the area is not within the sovereignty of the United States; (11) whether the same policies suited to the United States are adaptable to the local conditions of the foreign area; (12) whether the defendant's particular operations and their effects were confined within the territorial limits of a foreign nation; (13) whether the rights of other nations or their nationals may be infringed; (14) whether the alleged violation of the statute is grounded on a foreign nation's sovereign acts; (15) whether the extra-territorial operation of the statute would impugn foreign law or tend to interfere with the sovereignty, institutions, social conditions or commercial practices of another nation; and (16) whether the defendants or other persons whose conduct is to be directly affected are American citizens or foreign nationals, or residents of the United States or some other country.<sup>215</sup>

While this is the most complete statement of case law, other courts have adopted a similarly multi-faceted, although more concise, approach. In *Stegeman v. United States*,<sup>216</sup> the Ninth Circuit determined that a law forbidding fraudulent concealment in a bankruptcy matter could apply to conduct occurring in Canada.<sup>217</sup> It articulated a mild version of the *Foley* presumption, but also wrote of the

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214. *Air Line Stewards v. Trans World Airlines*, 173 F. Supp. 369, 377-78 (S.D.N.Y.), *aff'd*, 273 F.2d 69 (2d Cir. 1959), *cert. denied*, 362 U.S. 988 (1960).

215. *Id.* at 377-78. The court went on to find that the National Mediation Board's jurisdiction under the RLA did not apply to employees on planes flying solely outside the continental United States and its possessions. *Air Line Stewards*, 173 F. Supp. at 378-79.

216. 425 F.2d at 984.

217. *Id.* at 986.

need for the government to protect its own interests.<sup>218</sup> It pointed out that the statute contained no place limitation, and was "capable of perpetration without regard to locality."<sup>219</sup> It noted that the effects of the violation of the statute would "be felt principally within the U.S.," and concluded that "to exclude concealments by debtors outside the U.S. . . . would frustrate the statute's purpose by creating an obvious and readily available means of evasion."<sup>220</sup>

Similarly Judge Bork, in determining that United States securities laws did not apply to an audit report prepared for a German company, looked to where the effects of the violation would be felt, and whether acts done in the United States "directly caused" the losses suffered by the foreigners, then cited *Foley* and legislative history establishing the domestic intent of Congress in enacting the securities laws.<sup>221</sup> If the majority of the *Boureslan* justices had taken this less rigid, more multi-faceted approach, not only could they have given greater weight to the legislative history and to the EEOC's interpretation, but also they could have taken into account international accords and the fundamental policies behind Title VII.

Yet another canon of statutory construction holds that a statute should not be construed to violate international law unless Congress has affirmatively indicated an intent to do so.<sup>222</sup> Certainly no international law requires extraterritorial application of one sovereign's laws. But when the governments of many foreign nations have joined with the United States in exalting of equality of employment opportunity and decrying employment discrimination, it is ironic that our Supreme Court is hesitant to protect our own citizens from discrimination by our own citizens, merely because the discrimination occurred on foreign soil, particularly when the foreign nation is a signatory to some of these accords.<sup>223</sup>

As a member of the United Nations, this country has pledged to promote and encourage respect for human rights and fundamental freedoms, including freedom of employment opportunity for all races, genders, and religions.<sup>224</sup> Most na-

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218. *Id.* at 985-86 (citing *United States v. Bowman*, 260 U.S. 94 (1922) (finding criminal jurisdiction over a securities fraud conspiracy hatched aboard a ship voyaging from America to Brazil)).

219. *Id.* at 986.

220. *Id.*

221. *Zoelsch*, 824 F.2d at 27.

222. *Rossi v. Weinberger*, 456 U.S. 25, 32 (1982); *McCulloch*, 372 U.S. at 21-22; *Boureslan*, 857 F.2d at 1023 (King, J., dissenting); RESTATEMENT (SECOND) FOREIGN RELATIONS § 15 comment a (1962).

223. Saudi Arabia is a signatory to the ILO Convention.

224. U.N. CHARTER art. 1 para. 3; *id.* arts. 55-56; Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

tions of the world have agreed to similar pledges.<sup>225</sup> Any action, including applying Title VII extraterritorially, which reduces invidious discrimination on the grounds of race, color, religion or gender would seem to be in keeping with these accords.<sup>226</sup> The existence of these international agreements argues for application of a statute designed to further these same goals, especially if the alleged violation occurs within the borders of a co-signatory to these agreements. Other countries will be less likely to institute diplomatic protests over extraterritorial application of our law when they have agreed to the goals furthered by our law; therefore foreign reaction to our offshore application of antitrust laws is not a good indicator of reaction to application of Title VII abroad.<sup>227</sup>

Domestic policy, like international policy, deserves consideration when answering the close question of extraterritoriality. It is revealing that when the majority wrote of the equal plausibility of each side's positions, it let itself be swayed by a rickety eighty-year-old presumption rather than by the well-known goals of Title VII. Title VII was written to protect the right of African-Americans to first class citizenship, specifically by ensuring their rights to employment.<sup>228</sup> The primary impetus for the act was fear of domestic unrest, but some legislators also voiced concern about America's image in the world.<sup>229</sup> The rhetoric of President Kennedy added to the impetus: "In this year of the emancipation centennial,

225. International Labor Organization Convention Concerning Discrimination in Respect of Employment and Occupation, opened for signature June 25, 1958, 362 U.N.T.S. 31; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1965); International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 53, 55-56, U.N. Doc. A/6316 (1966); Declaration on Social Progress and Development, G.A. Res. 2542, U.N. GAOR, 24th Sess., Supp. No. 30, at 49, U.N. Doc. A/7630 (1969); International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9233/Add. 1 (1973); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979); Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding Between Peoples, G.A. Res. 2037, U.N. GAOR 20th Sess., Supp. No. 14, at 40, U.N. Doc. A/6014 (1952); Convention Concerning Discrimination in Respect of Employment and Occupation, ILO Convention, No. 111.

226. Requiring United States companies to comply with Title VII abroad would be in pleasing symmetry with rulings that foreign employers on United States soil must comply with Title VII, despite treaty language arguably to the contrary. See *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989).

227. See Note, *Age Discrimination—Extraterritorial Application of the Age Discrimination in Employment Act—Equal Employment Opportunity Commission Determines That a United States Corporation Operating in West Germany Is Subject to Suit Under the Age Discrimination in Employment Act—Employer's Defense Based on Compliance with West German Law Rejected*, 20 GA. J. INT'L & COMP. L. 207, 217 (1990) (citing J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 102-05 (2d ed. 1981)).

228. Legislators wrote of the 1964 Civil Rights Act:

In other titles of this bill we have endeavored to protect the Negro's right to first-class citizenship. Through voting, education, equal protection of the laws, and free access to places of public accommodations, means have been fashioned to eliminate racial discrimination.

The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one's pockets are empty. The principle of equal treatment under law can have little meaning if in practice its benefits are denied the citizen.

1964 U.S. CODE CONG. & ADMIN. NEWS 2513.

229. See *Boureslan*, 857 F.2d at 1027-28 (King, J., dissenting).

justice requires us to insure the blessing of liberty for all Americans and their posterity — *not merely for reasons of economic efficiency, world diplomacy, and domestic tranquility — but, above all, because it is right.*" <sup>230</sup>

Judge King used this quotation to argue that extraterritoriality was contemplated at the time of passage of Title VII. Even if the quotation does not go that far, it obviously indicates a global view. Perhaps the United States citizen who voluntarily expatriates himself, leaving American soil, then comes crying to the American courts when his toes are stepped on does not generate much sympathy. But the spectre of someone dutifully doing a foreign tour in order to advance in an American corporation, then being subjected to treatment that would be illegal on American soil, is certainly anathema to the vision of those who drafted Title VII in order to protect the minority's right to full employment.

One of the goals of Title VII was to change people's thinking, to change the employment climate for people of color. Courts interpreting Title VII consistently with our international commitment to full human rights have shown no reluctance to impose American anti-discrimination point of view on other countries, and to force American companies operating abroad to conform with American law in the face of the realities of international business practice. In *Fernandez v. Wynn Oil Co.*,<sup>231</sup> the Ninth Circuit rejected a district court finding that masculine gender was a BFOQ<sup>232</sup> for a position which required dealing with Latin American clients who "would react negatively to a woman vice-president . . . ." <sup>233</sup> The circuit panel noted a lack of proof that hiring a woman in the position would " 'destroy the essence' of Wynn's business or 'create serious safety and efficacy problems.' " <sup>234</sup> The panel went on to state that as a matter of law customer preferences or "the need to accommodate racially discriminatory policies of other nations cannot be the basis of a valid BFOQ . . . ." <sup>235</sup> Although the panel declared that it was not imposing American standards of non-discrimination on other nations,<sup>236</sup> it clearly was doing two things: forcing non-American businessmen to "get used to" females in business, and forcing American businesses to compete in an international market with what at least the company perceived as a handicap. *Fernandez* is consistent

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230. *Boureslan*, 857 F.2d at 1026 (King, J., dissenting).

231. 653 F.2d 1273, 1276 (9th Cir. 1981).

232. See *supra* notes 115 and 147.

233. *Id.* at 1274.

234. *Id.* at 1276.

235. *Id.* at 1276-77. The decision of the district court was nonetheless upheld because the plaintiff had not proven that she was qualified for the position.

236. Wynn attempts to distinguish *Diaz* [holding that customer preference based on sexual stereotype cannot justify discriminatory conduct] by asserting that a separate rule applies in international contexts. Such a distinction is unfounded. Though the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system, the district court's rule would allow other nations to dictate discrimination in this country. No foreign nation can compel the non-enforcement of Title VII here.

*Id.* at 1277.

with the general rule that customer preference is not a defense, which furthers the far-reaching goals of Title VII.<sup>237</sup>

If the *Boureslan* majority had been willing to take a broader approach to the question of extraterritoriality, rather than relying on *Foley*'s weak canon, it could have considered the domestic effect of violations of the Title, the full legislative history, the international climate and the overall goals of the Act. The *Boureslan* majority might have prevented a fundamental unfairness, best caught by the title of a law review note: "Same Boss, Different Rules."<sup>238</sup>

### *E. The Theory of Broad Application of Title VII*

*Boureslan* also runs counter to the general rule in the circuits that Title VII jurisdiction is to be liberally construed. In *Quijano v. University Federal Credit Union*,<sup>239</sup> the Fifth Circuit struggled with the question of whether a credit union fell within the exemption to Title VII for "bona-fide private membership clubs."<sup>240</sup> The court began:

The proposition which guides our analysis of this question is that "Title VII of the Civil Rights Act of 1964 is to be accorded a liberal construction in order to carry out the purposes of Congress to eliminate the inconvenience, unfairness and humiliation of racial discrimination." The statute's definition of "employer" is entitled to similar liberal construction.<sup>241</sup>

In concluding that the credit union was not exempt, the court noted "Congress' effort to eliminate the affects [sic] of discrimination in almost every facet of society

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It is ironic that it was the Fifth Circuit which decided against Mr. Boureslan, for that very circuit has not been hesitant to give liberal construction to Title VII's provisions, and has been home to various expansive opinions. Jurisdictional pre-

237. A holding similar both in its substance and in its silence regarding its full ramifications has been made by the EEOC. CCH EEOC Decisions (1973) ¶ 6317.

238. Note, *Same Boss, Different Rules: An Argument for Extraterritorial Extension of Title VII to Protect U.S. Citizens Employed Abroad by U.S. Multinational Corporations*, 30 VA. J. INT'L L. 479 (1990).

239. 617 F.2d 129 (5th Cir. 1980).

240. *Id.* at 130 (quoting 42 U.S.C. § 2000e(b)(2)(1988)).

241. *Quijano*, 617 F.2d at 131 (quoting *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 425 (8th Cir. 1970)). The membership club exception has generally been narrowly construed. See generally B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1007 (BNA 2d ed. 1983), and cases cited therein.

242. *Quijano*, 617 F.2d at 133.



requisites to Title VII claims have been equitably modified,<sup>243</sup> the right-to-sue letter prerequisite has been broadly construed,<sup>244</sup> a private plaintiff has been allowed to bring suit even though the EEOC had already brought a suit on her behalf which had been dismissed,<sup>245</sup> and particularly broad discovery expeditions have been allowed.<sup>246</sup> Similar holdings can be found in other jurisdictions.<sup>247</sup>

In particular this liberal construction rule has been used to allow expansive definitions of a Title VII "employer."<sup>248</sup> The term has been given an international

243. *Irwin v. Veterans Admin.*, 111 S. Ct. 453 (1990); *Love v. Pullman Co.*, 404 U.S. 522 (1972); *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975); and further discussion in *Chappell v. Emco Mach. Works Co.*, 601 F.2d 1295 (5th Cir. 1979); see also *Truvillion v. King's Daughters Hosp.*, 614 F.2d 520, 527 n.14 (5th Cir. 1980), and cases cited therein.

Judge Wisdom is one of the prime movers toward equitable interpretation of jurisdictional prerequisites. For an earlier case with a similar result, see *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970) (holding that filing period should be tolled while the employee is invoking contractual grievance remedies). See generally Note, *Title VII—Time Limitation for Filing Charge with EEOC is Subject to Equitable Tolling*, 55 NOTRE DAME LAW. 614 (1980), noting the dispute among the circuits in this point. For cases declining to toll the period, see *Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1337-39 n.8 (5th Cir. 1979); *Chappell v. Emco Mach. Works Co.*, 601 F.2d 1295, 1304 (5th Cir. 1979); *Bickham v. Miller*, 584 F.2d 736, 738 (5th Cir. 1978); see also *Sanchez v. Standard Brands*, 431 F.2d 455 (5th Cir. 1970) (reversal of lower court's decision to dismiss complaint because plaintiff had written the wrong words and checked the wrong box in filing out an administrative charge form supplied by the EEOC); *Georgia Power Co. v. EEOC*, 412 F.2d 462 (5th Cir. 1969).

244. *Franks v. Bowman Transp. Co.*, 495 F.2d 398, 402-06 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747 (1976).

245. *Truvillion v. King's Daughters Hosp.*, 614 F.2d 520 (5th Cir. 1980). The EEOC's suit had been dismissed for failure to comply with jurisdictional preconditions. "Put simply, it would be anomalous to deny a person the right to bring her own action, when the EEOC could have started over, conducted a good faith investigation, issued a reasonable cause finding and brought a second action on the same claim." *Id.* at 527.

246. *Parliament House Motor Hotel v. EEOC*, 444 F.2d 1335, 1339 n.5 (5th Cir. 1971).

As we noted in *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 461 (5th Cir. 1970), courts confronted with procedural ambiguities in the statutory framework have, with virtual unanimity, resolved them in favor of the complaining party. It has been held, for example, that a class action can be maintained under the Act even though only one member of the class has filed a charge of discrimination. *Miller v. International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968). In addition, courts have held that the statutory requirement that a charge of discrimination be "under oath" can be satisfied by verification after the expiration of the ninety-day period. *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355 (6th Cir. 1969); *Georgia Power Co. v. EEOC*, 412 F.2d 462 (5th Cir. 1969); *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir. 1968).

*Id.* See also *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1972) (plaintiff charged that employer, an optometrist, had created a work environment "heavily charged with discrimination" by segregating employer's optometry patients; EEOC therefore entitled to broad discovery to determine whether evidence existed of a discriminatory employment practice proscribed by Title VII).

247. *E.g.*, *Coles v. Penny*, 531 F.2d 609, 615 (D.C. Cir. 1976); *Henderson v. Eastern Freight Ways Inc.*, 460 F.2d 258, 260 (4th Cir.), *cert. denied*, 410 U.S. 912 (1972).

248. 42 U.S.C. § 2000e(b)(1988). See *Harvey v. Blake*, 913 F.2d 226, 227 (5th Cir. 1990) (finding immediate supervisors to be "employers" when they can hire and fire); *Williams v. City of Montgomery*, 742 F.2d 586, 589 (11th Cir. 1984) (holding that city and city-county personnel board and its members who were in charge of hiring and firing members of the city's Fire Department were liable as "employers" by virtue of the agency relationship); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389 (8th Cir. 1977) (holding that "broadcasting companies shar[ing] management and ownership and operations were sufficiently interrelated so that companies could be consolidated as 'employers' for jurisdictional purposes of Title VII . . ."); *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973) (male private duty nurse allowed to bring action against hospital which did not employ him but which ran a nurse registry and referral system); *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089 (D.N.H. 1974) (holding State Racing Commission and state trotting and breeding association "employers" because they controlled licensing of, and stall space for, driver-trainers of harness horses).

reach. In *Ward v. W & H Voortman*,<sup>249</sup> the court denied a Canadian defendant employer's motion to dismiss.<sup>250</sup> The defendant had asserted that Title VII did not apply to a foreign corporation.<sup>251</sup> In deciding that Title VII applied to the Canadian employer, the court found persuasive the *Quijano* decision and other cases requiring broad application of Title VII.<sup>252</sup>

#### V. A CALL FOR CONGRESSIONAL ACTION

An unknown number of United States citizens will be affected by the determination that Title VII does not protect them from employment discrimination committed *off* American soil but *by* American companies. Statistics regarding the number of United States citizens working for United States companies abroad have proven elusive, for they are not compiled with regularity by the Bureau of Labor Statistics.<sup>253</sup> But even if it were available, this number would underestimate how many Americans are affected by *Boureslan*. Removing Title VII protection from overseas branches will have an impact not only on those employed overseas but also on any worker who perceives that she or he "can't go" to a certain branch or who elects not to go abroad out of fear of unchecked discrimination. By winking at employment discrimination in any way, the Court increases the number of Americans who become discouraged before they try. Many of the benefits of our civil rights laws are reaped through changed perceptions, both on the part of potential victims (that someone is watching out for them) and potential oppressors (that someone is watching them). Civil libertarians grieve the *Boureslan* outcome because it appears to give American companies free rein to do whatever they please abroad. Neal Paster, the Houston attorney representing Mr. Boureslan, stated the

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249. 685 F. Supp. 231 (M.D. Ala. 1988). The court noted that Congress had not exempted foreign employers, although it had exempted other employers. *Id.*

Moreover, by exempting employment of aliens abroad, Congress apparently intended to avoid possible conflicts between American law and foreign law. If Congress had intended, out of a similar concern for foreign relations, to draw as important a distinction as one between domestic and foreign employers doing business domestically, it surely would have made its intent known expressly, just as it did with regard to aliens abroad.

*Id.*

250. *Id.*

251. *Id.*

252. 685 F. Supp. at 232.

253. The *New York Times* blithely asserts, without citation, that *Boureslan* leaves "hundreds of thousands" of Americans with protection. *N.Y. Times*, Mar. 27, 1991, at A16, col. 3. The *New York Times* also reported on Jan. 5, 1988 that 35,000 to 40,000 Americans lived in Saudi Arabia alone. According to the Benchmark Survey of United States Direct Investment Abroad compiled by the Bureau of Economic Analysis, United States Department of Commerce in 1982, 41,000 United States citizens were then employed by majority-owned foreign affiliates of United States companies. Of course *Boureslan* would probably not be applicable to them since the affiliates would presumably not be American companies. For a discussion of the difficulty of finding statistics, and estimates that about two million Americans live abroad, see Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U.L. REV. 339, 389-90 n.289 (1990).

practical result of the decision as: "If a company wants to get rid of an employee, all it has to do is transfer him overseas and then fire him."<sup>254</sup>

The concern of American businesses that they will be subjected to weak or utterly unfounded suits has been growing and has received political recognition in recent years.<sup>255</sup> *Boureslan*'s holding that the EEOC has no jurisdiction over acts occurring overseas provides employers an escape hatch; will "difficult cases" or "problem people" now be sent out of the country to be dealt with?

The *Boureslan* result may also provide added impetus for American companies to move their offices abroad. For years American workers have had to compete with cheaper foreign labor. Now American workers at all levels who choose to stay in their homeland must compete with those Americans who are willing to sacrifice their civil rights and go abroad. Further, companies with the resources to open foreign branches will have an unfair advantage over stay-at-home American businesses since they will have a lowered threat of lawsuits hanging over their heads. This means, if nothing else, a smaller legal staff and less paperwork.

Particularly disturbing is the fact that in many corporate enterprises the path to advancement includes a stint overseas. Now employees are forced into an unprotected interlude if they seek to rise to the top. Again, the chilling effect of such a requirement must be considered when assessing the damage resulting from the *Boureslan* finding.

Coke has written, "[F]oreign employment is a kind of honorable banishment."<sup>256</sup> It need not be so. Employment on foreign soil ought not to be a step outside of the protective umbrella of Title VII. It is regrettable that the majority of the Supreme Court chose to use *Boureslan* as a vehicle to rejuvenate the overly-facile *Foley* presumption, and in so doing shorten the protective reach of Title VII, a statute designed to remedy civil rights violations. Congress shares some of the blame for its lack of precision in drafting Title VII and the new ADA. This is lamentable and must be corrected. Any piece of legislation, particularly a broad-sweeping federal remedial statute, should expressly state where and to whom it applies. As the *Boureslan* majority points out, Congress does know how to make a statute apply extraterritorially.<sup>257</sup> In fact, Chief Justice Rehnquist invited Congress to amend Title VII to make its extraterritorial application clear. Congress should do so, and should at the same time answer the various questions posed by the majority and by legal scholars about how the act will apply to acts committed off United States soil. Equally important on the Congressional agenda should be a parallel amendment of

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254. Wall St. J., Feb. 5, 1990, at B8, col. 3. Mr. Paster was referring to the Fifth Circuit decision; nothing in the Supreme Court opinion would appear to dispel his concerns. Of course theoretically, the fraud and conspiracy exceptions would protect against this to some extent, although the fact-dependent nature of those exceptions will provide little comfort to potential plaintiffs.

255. Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1988); see *President Vetoes Bill on Job Rights*, N.Y. Times, Oct. 23, 1990, at 1, col. 4.

256. LEGAL QUOTATIONS 246 (citing 11 D.N.B. 237).

257. Indeed, if the majority justices had used *Boureslan* to announce a new rule, namely that extraterritorial application occurs only upon express legislative statement, their position would have been far more intellectually honest than the one they chose, of resurrecting feeble *Foley*.

the ADA. Chief Justice Rehnquist pointed out in passing that the same uncertainty exists regarding the extraterritorial application of this brand new Act.

The new legislation should, of course, expressly make clear that the employment rights laws protect American citizens from unlawful discrimination by American companies acting abroad.<sup>258</sup> The legislation should spell out that the EEOC or other investigative agency for the ADA has jurisdiction to investigate abroad.<sup>259</sup> Venue rules are already sufficient.<sup>260</sup> Congress should adopt, or at least cite with approval, the standards set out by the EEOC regarding whether or not a subsidiary is sufficiently separate to be considered a separate company from its parent.<sup>261</sup>

Conflict of laws concerns should perhaps be addressed in more detail, although the BFOQ defense already provides some relief to employers. An affirmative defense should be created entitled "Compliance with Foreign Law." If an American company doing business abroad must engage in what would be unlawful discrimination in America in order to comply with the laws of its host country, compliance

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258. Senator E. Kennedy (D. Mass.) has suggested incorporating such an extraterritoriality clause into the latest version of the Civil Rights Restoration Act now pending. At least one political analyst has suggested that the extraterritoriality provision is so important that its fate ought not to turn on that of the controversial Restoration Act. Megna, *Workers Overseas*, Leaf-Chron. (Clarksville, Tenn.), Apr. 15, 1991, at 4A, col. 1.

259. For a discussion of the conflicts between domestic discovery orders and foreign nondisclosure laws, see Note, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 COLUM. L. REV. 1320 (1983).

260. See *supra* note 115.

261. See *supra* notes 169-180 and accompanying text. Perhaps Congress should consider regulation of majority-owned foreign affiliates and subsidiaries of U.S. companies. Otherwise Title VII violations will continue to be easy to commit abroad. See generally, *Mas Marques v. Digital Equip. Corp.* 637 F.2d 24 (1st Cir. 1980); *Linskey v. Heidelberg E., Inc.*, 470 F. Supp. 1181 (E.D.N.Y. 1979).

with the host country's laws should be a defense. Of course this defense would need to be construed narrowly.<sup>262</sup>

An additional casualty of the *Boureslan* decision is the rule that Title VII jurisdiction is to be liberally construed. Indeed the case is one in a series of cases narrowing the clout of the civil rights laws as tools to empower those who have traditionally been disenfranchised and victimized, and construing the words of Title VII against those whom the statute was expressly designed to protect.<sup>263</sup> In his dissent to *Ward's Cove Packing, Inc. v. Atonio*,<sup>264</sup> Justice Blackmun wrote, "One wonders whether the majority still believes that race discrimination — or, more accurately, race discrimination against non-whites — is a problem in our society, or even remembers that it ever was."<sup>265</sup>

In view of this trend, Congress should consider further amending Title VII to include either a statement purpose, a construction guideline, or both. Such a guideline was included as § 11 of the proposed Civil Rights Act of 1990,<sup>266</sup> which provided: "All federal laws protecting the civil rights of persons shall be broadly construed to effectuate the purpose of such laws to eliminate discrimination and provide effective remedies."<sup>267</sup>

262. Various other more difficult issues come to mind and are outside the scope of this article. *See generally*, 1988 EEOC Policy Statement. Should compliance with foreign customs or social mores be a defense? The danger is that the defense will swallow the rule. On the other hand it is disturbing to effectively tie the hands of American businesses trying to compete in global markets. This determination is perhaps best made by the courts on a case by case basis. *Cf. Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1277 (9th Cir. 1981); EEOC Dec. No. 90-1 (Apr. 10, 1990) ("Absent a conflict of laws between Title VII and the laws of the host country, U.S. employers may not discriminate against U.S. citizens abroad in violation of Title VII simply because it conforms to the customs or preferences of that country."); CCH EEOC Decisions (1973) ¶ 6317; *Kern v. Dynaelectron*, 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd mem.*, 746 F.2d 801 (5th Cir. 1984) (allowing religious discrimination in hiring of pilots because under Saudi Arabian laws non-Muslim pilots flying into Mecca would be beheaded); *American Jewish Congress v. Carter*, 173 N.E.2d 778, 190 N.Y.S.2d 218 (1959). *See also* Cherian, *Current Developments in Transnational Employment Rights*, 40 LAB. L. J. 259 (1989), in which the author points out that certain forms of discrimination may be less prevalent abroad than Americans might suppose. For instance, data from the International Labor Organization shows almost as many women managers and administrators in Latin America as in the United States (14% vs. 15%, respectively). For a discussion of the clashes between American and Saudi Arabian law, *see* Note, *United States Corporations Operating in Saudi Arabia and Laws Affecting Discrimination in Employment: Which Law Shall Prevail?*, 8 LOY. L.A. INT'L & COMP. L.J. 135 (1985). For further discussion, *see* Comment, *Strangers in a Strange Land: Foreign Compulsion and Extraterritorial Application of United States Employment Law*, 11 NW. J. OF INT'L L. & BUS. 371 (1990), which includes a discussion of another employment lawsuit against Aramco.

Another potential problem would concern an allegation that an American company chose to branch into a particular foreign country because its laws required discrimination against a given group, so that the corporation would have an excuse to discriminate against the group. Such a claim could even be brought after *Boureslan* and without any amendment of Title VII. Presumably this would be an employment practice adopted in America which had an adverse impact on a given group.

Yet another potential issue is whether United States companies abroad should be permitted to discriminate against foreign nationals. In other words, should the alien exemption provision be repealed? *See* Dehner, *Multinational Enterprise and Racial Non-Discrimination: United States Enforcement of an International Human Right*, 15 HARV. INT'L L.J. 71 (1974).

263. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

264. 490 U.S. 642 (1989).

265. *Id.* at 662 (Blackmun, J., dissenting).

266. H.R. 400, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess. (1990) (defeated by presidential veto).

267. S. 2104, 101st Cong., 2d Sess., 136 Cong. Rec. 1019-20 (1990).

Charles Shanor, former General Counsel for the EEOC, found this particular clause "deeply troubling."<sup>268</sup> Two of his objections go to vagueness: he wonders what are included in the "civil rights laws", and he worries that the "provide effective remedies" directive is a veiled go-ahead for punitive damages.<sup>269</sup> These are valid critiques. The proposal made in this article concerns only Title VII, and the remedies question is outside the scope of this article. Certainly if Congress intends to change the remedial provisions of Title VII, the modifications should be express and clear, not mere hints.

Mr. Shanor also wonders if this proposed provision would affect such decisions as *International Brotherhood of Teamsters v. United States*<sup>270</sup> and *United Steelworkers of America v. Weber*.<sup>271</sup> He worries that much settled law will be disturbed, thereby enriching lawyers and further overburdening the legal system.<sup>272</sup> Yes, such a provision might lead to the rethinking of past cases, which many civil libertarians might consider long overdue. But Mr. Shanor's mention of *Weber* is useful, for it reminds us that even a broad construction of the act in favor of certain groups should not lead to the unnecessary trammelling of the rights of those in groups which have traditionally been the dominant "haves" in a given line of work.

A well-written construction clause would indicate which groups the Act was drafted to protect such as, "those groups which have traditionally been discriminated against in the job category at issue in the case." Male nurses, black firefighters, and female truck drivers would all thereby be entitled to broader construction of the act. The legislative amendment should also make reference to the competing concern that innocent third parties should not be unduly thwarted in the pursuit of their employment goals. In order to explore more fully the delicate balancing required, Congress might prefer a chattier and more expansive "statement of purpose" instead of a "construction guideline."

## VI. CONCLUSION

The *Boureslan* majority breathed unwarranted strength into a canon which oversimplifies a complicated question of statutory construction. The *Boureslan* result has narrowed Title VII and limited its effectiveness as a piece of legislation designed to remedy and prevent employment discrimination. Congress can and should take steps to overturn *Boureslan*'s effect by expressly providing for extraterritorial application of both Title VII and the ADA.

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268. Shanor, *Some Observations on Broadly Construing Civil Rights Laws*, 14 Harv. J.L. & Pub. Pol'y 8, 10 (1991).

269. *Id.*

270. 431 U.S. 324 (1977) (approving a seniority system despite its disparate impact on minority groups).

271. 443 U.S. 193 (1979) (allowing a race-conscious affirmative action program if certain criteria are met).

272. Shanor, *Some Observations on Broadly Construing Civil Rights Laws*, 14 HARV. J.L. & PUB. POL'Y 8, 11 (1991).